

A
TREATISE
ON
PROCEEDINGS IN EQUITY,

BY WAY OF

Supplement and Rebibor.

WITH AN APPENDIX OF PRECEDENTS.



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OF LINCOLN'S-INN, BARRISTER-AT-LAW.



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P R E F A C E.

THE subject of this treatise has appeared to the author to deserve a more detailed notice than it has hitherto received. Occupying a portion only of works which embrace the whole field of Equity Pleadings or Practice, it has been necessarily circumscribed within limits too narrow to admit of much discussion. By devoting a volume to its exclusive consideration, and subjecting it to a more strict analysis than it has as yet undergone, the author has thought that its principles may be better developed than they have hitherto been, and that much of the obscurity of which Lord Redesdale complains may be,—if not dispersed,—at least put in train for dispersion by others.

With this view the author has departed from the method which has been adopted in former treatises;—that of first describing the bills in use, and then proceeding to inquire to what circumstances they are applicable;—and has preferred bringing the imperfections before the reader in the first instance, and thence deducing the measures provided for their

cure. In other words, whilst hitherto Supplemental Bills and Bills of Revivor have been taken as the *data*, and their objects as the *quæsitæ*, the present author, reversing the problem, has treated Defect and Abatement as the matter given, and their respective remedies as the question to be determined.

With respect to the precedents of Bills and Petitions given in the Appendix, the author thinks it proper to state that in a few instances, where he has been unable to meet with a precedent which suited his purpose, he has composed a fictitious form out of the materials within his reach. This is also the case with the Order, No. VI., which is an adaptation of the Order in *Partridge v. Usborne*, (Reg. Lib. 1827, B. fol. 2249,) made to suit the petition and bill which precede and follow it. With this exception the Orders and Decrees are genuine.

18, *Old Square, Lincoln's Inn*,
1st July, 1843.

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ADDENDA ET CORRIGENDA.

Page 7, note (i), add "See also *Wood v. Wood*, 1840, 4 Y. & Coll. E. E. 185."

P. 49, line 15, for "of" read "when."

P. 80, note (i), insert the date, "1634."

P. 89, note (f), col. 1, lines 6, 7, for "have scen" read "shall see."

P. 104, line 12, refer to "*Phelps v. Sproule*, 1831, 4 Sim. 318."

P. 106, line 19, dele "the."

P. 111, line 9, refer to "*Cave v. Cork*, 1843, 2 Y. & Coll. C. C. 130."

P. 146, note, add "affirmed, 1843, 7 Jurist, 500. See also S. C., 2 Y. & Coll. C. C. 42."

P. 155, note (r), col. 1, line 7, for "Acts" read "sections."

P. 175, note (d), add "In *Tennant v. Storar*, 1843, 7 Jurist, 526, where the plaintiffs became insolvent, Sir J. L. Knight Bruce, V. C., dismissed their bill in default &c. *with* costs; ordering, however, that no proceedings should be taken against the plaintiffs, personally, for the costs."

A TREATISE,

&c.



CHAPTER I.

INTRODUCTION.

THE object of this Treatise is to point out the remedies for such imperfections as may exist or occur in the frame of a suit in Equity, and cannot be corrected by Amendment of the Original Bill.

Object of the
Work.

A certain description of imperfections, therefore, being excluded from the consideration of this work, it may be desirable to show more fully to what that exclusion applies.

Within certain limits of time, and of subject matter, Amendment. a plaintiff is allowed to correct an error by amendment of his original bill. The bill so amended speaks from its original date, and the plaintiff is thereby put in the same situation as if the error in question had never existed. From this property, however, of an amended bill, it necessarily follows that that remedy is applicable to those imperfections only which are originally inherent in a suit, and not to those which may arise in it from the subsequent course of events. For it would be manifestly absurd to allow a document which is to bear date as from a past period, to refer to an event posterior in time to such date. All imperfections, therefore, which arise in a suit during the progress of it, are incapable of being remedied by

Imperfections
subsequent to
filing of original
bill.

Object of the
Work.

amendment (*a*), and fall, consequently, within the province of this Treatise.

Imperfections
originally in-
herent.

Nor are imperfections originally inherent in the suit, and which seem to form the natural subject of amendment, always susceptible of that remedy. Amendment may become impossible from changes which have happened relative to the subject of the imperfection since the beginning of the suit; or from the progress which has been made in the suit rendering an alteration in the original bill inconvenient.

Obstacle from
a change in the
imperfection.

The first sort of obstacle may occur in various ways, but it will be sufficient to give a single example. Suppose that in the original bill a necessary party is omitted;—here is an imperfection inherent in the suit *ab initio*, and capable of being remedied by amendment. But suppose that, before the bill is amended, the party omitted dies, and thereby some other person becomes a necessary party;—the remedy by amendment is clearly no longer available, as it would be necessary to state in the bill an event subsequent to the filing of it, which we have seen is inadmissible.

Obstacle from
the advanced
stage of the
suit.

The second sort of obstacle to amendment, arises from the inconvenience of deranging the suit after a certain period. When a cause has gone through several stages, any material alteration in the original bill, on which all the proceedings hinge, would obviously tend to produce great confusion. The liberty, therefore, allowed to a plaintiff, of amending his bill, becomes more and more circumscribed as the suit draws nearer to its termination; and in the same proportion his power of using the remedies treated of in this work increases.

(*a*) In some few instances the Court breaks through this rule, and allows events which occur after the filing of the original bill to be introduced into it by amendment. These will be noticed in a subsequent part of this work.

From what has been said above, our subject will naturally divide itself into two parts; the first of which will treat of cases where the suit is imperfect from the beginning; while the second will be devoted to those in which the suit, though originally complete, becomes imperfect by subsequent events.

Object of the
Work.

CHAPTER II.

OF IMPERFECTIONS ORIGINALLY INHERENT IN
THE SUIT.

The nature of
the Remedy.

WHENEVER an error has been committed in the frame of an original bill, the suit is from the beginning more or less imperfect. It is obvious that there are various sorts of such errors. The plaintiff may subsequently discover that some fact has been falsely stated ;—that some material fact has been altogether omitted ;—that the prayer of his bill is not sufficiently extensive ;—or, lastly, that he has neglected to include in the suit some one who is a necessary party to it (*a*).

Amendment.

It has been already stated, that up to certain periods of the proceedings these imperfections may, with more or less of difficulty, be remedied by *amendment* of the original bill, unless there has been any change in the subject of the imperfection since the filing of that bill. It will be necessary, therefore, before we proceed to consider any other remedy, to call to mind the limits within which amendment is applicable.

We learn from the treatises on this subject, that, until answer, a plaintiff may amend his bill as often as he pleases ; and that the leave of the Court for that purpose may be obtained as of course ;—that after answer, and before replication, his right is restricted to

(*a*) Another fault in a bill may be, that it includes unnecessary parties. But this is either matter of surplusage only, and does not affect the efficacy of the suit, as where the superfluous party is a defendant, in which case it is remedied by dismissing the bill against him ; or it is vitally prejudicial, as where one of several plaintiffs has no interest in the suit, in which case it is incapable of remedy.

once only, except upon the terms specified in the Thirteenth Order of 1828 ;—but that after replication no amendment can in general be made, because the replication has the effect of putting the cause in issue. It is true that, in some cases, the Court will allow the plaintiff to *withdraw* his replication, and *then* to amend his original bill ; but for this purpose special leave must be obtained upon motion with notice ; and the Court must be satisfied, not only that the matter of the proposed amendment is material, but that it could not with reasonable diligence have been sooner introduced into the cause (*b*).

The nature of
the Remedy.

It is true, also, that there are some cases in which, after replication, a bill may be amended without withdrawing the replication. Thus it appears that the prayer for relief may be extended after replication, if the case *already made* by the bill warrants the prayer for the additional relief (*c*) ; although a *new case* cannot be made without first withdrawing the replication. So new parties may be added by amendment while a replication is on the file, and new averments may be made for the purpose of shewing the necessity of such new parties, provided such new averments do not vary the case *already made* against the original parties (*d*).

As, however, it is not at all times, and on all occasions, that imperfections in the frame of a suit can be remedied by amendment, another sort of remedy is permitted. This is obtained by filing a new bill, which refers to the original bill, and states the new matter necessary to be brought before the Court, and prays relief founded upon such new matter according to the circumstances of the case, together with the benefit of

Supplemental
bill.

(*b*) Order XV. 1828.

(*d*) *Palk v. Clinton*, 12

(*c*) *Beaumont v. Boulthbee*, 1800, Ves. 64.
cited 12 Ves. 64.

The nature of
the Remedy.

the former proceedings in the suit; and, in case the object is to bring forward a new party, calls upon him to answer the original bill. This bill being not an independent document, but a sort of rider attached to another bill, and supplying the defects in it, is called a *supplemental bill* (e).

Thus, in *Goodwin v. Goodwin* (f), after publication had passed, and the cause was set down, the plaintiff attempted to introduce the statement of a will, by amendment, into the original bill. But, at the hearing, Lord Hardwicke held that such amendment, after publication passed in the cause, was irregular; but ordered the cause to stand over, in order that the plaintiff might bring the will before the Court by supplemental bill.

Amendment
preferable to
supplemental
bill.

As long as the proceedings are in such a state as to admit of amendment of the original bill, that way of remedying an imperfection is obviously preferable to filing a supplemental bill, being both more simple and less expensive. As a general rule, therefore, it may be stated, with Lord Redesdale, that “wherever the same end may be obtained by amendment, the Court will not permit a supplemental bill to be filed (g).” It is apprehended, however, that even if the plaintiff might, under the Fifteenth Order of 1828, above referred to, obtain leave to withdraw his replication and amend his original bill, yet he is not bound to ask leave to

(e) According to Lord Hardwicke, [*vide* 3 Atk. 217,] this title more properly belongs to another sort of bill, filed for bringing before the Court matter which has arisen *subsequently* to the filing of the original bill, and which will be considered hereafter. The name has, however, become indiscriminately applicable to both sorts of

bills; though, as some error has arisen from confounding the two together, it may be regretted that the species of bill under consideration is not distinguished by a different title. It might, for instance, be termed a *supplementary bill*.

(f) 1746, 3 Atk. 370.

(g) Ld. Red. ed. 4, p. 62.

adopt this method of remedying his imperfection, but may file a supplemental bill at once, for that purpose, The nature of the Remedy. if he prefers it (*h*).

It seems also that, if amendment is permitted out of its proper place, for one of the purposes for which we have seen it is permitted, this does not take from the plaintiff the right which he before had of having recourse to a supplemental bill for the same purpose. Thus, in *Greenwood v. Atkinson* (*i*), where at the hearing the defendant insisted that a party, by whom he was entitled to be reimbursed what he (the defendant) should have to pay to the plaintiff, was a necessary party to the suit; and the cause was permitted to stand over with liberty to the plaintiff to add such new party by amendment, and to introduce averments shewing him to be a necessary party; the plaintiff, instead of amending, filed a supplemental bill for that purpose, and was held to be justified in so doing.

It appears then that, *before* replication, a supplemental bill for correcting an inherent error will not lie; and that the plaintiff's power of filing such a bill commences after replication; subject however, even then, to certain conditions as to the relevancy of the new matter, the diligence of the plaintiff in bringing it forward, and the effects which it seems likely to have on the end and object of the suit. And having once commenced, the power seems to continue to the last period of the suit: thus the Court will frequently postpone the hearing of the original suit, in order to give an opportunity of filing such a bill; and even *after decree* this method of supplying an omission in the original bill may be resorted to, provided that the

In what stages a supplemental bill will lie.

(*h*) *Crompton v. Wombwell*, 1831, 4 Sim. 628. (*i*) 1832, 5 Sim. 419.

The nature of the Remedy. nature of the supplemental matter does not militate against any of the conditions laid down hereafter (*k*).

For what purposes a Supplemental Bill may be filed. Even where amendment is no longer possible, it is not always that an imperfection inherent in the frame of a suit can be remedied by supplemental bill. The period of the suit may be a proper one for such a remedy; but still the supplemental matter may be improper to be brought forward, either on account of its nature, or from extrinsic circumstances. We will proceed then to consider the several purposes for which a supplemental bill, of the species in question, may be filed; at the same time pointing out such circumstances as have been held fatal to the adoption of that remedy.

The supplemental matter must have been unknown at the filing of the original bill. As a general rule, it may be laid down that it is essential to the validity of a supplemental bill, that the plaintiff should have been ignorant of the supplemental matter, whatever it may be, at the time of filing the original bill.

Thus, where a plaintiff filed a bill for a partition of certain leasehold property, to which he and the defendant were entitled in undivided moieties, and the defendant, who had been in possession of the whole property, claimed a lien on it for certain improvements made by him, and the Court ordered an account of what had been expended in such improvements; the plaintiff filed a supplemental bill, charging that the defendant had received various sums of money, to a considerable amount, during the period of his occupation, for rent; and that he had wasted the property. The bill prayed a further account in respect of such

(*k*) A supplemental bill to carry a decree into execution, and to add new parties, has been held to be regularly filed, even pending an appeal by the defendant from the decree. *Woodward v. Woodward*, 1799, Dick. 33.

matters; but a demurrer, for that the supplemental matter must all have arisen, and been known to the plaintiff, before the time of filing the original bill, was allowed by the Court; who observed, that “however just it might be that the account should be extended as prayed, this could not be the proper course for obtaining such end. The plaintiff should either have amended his bill on the defendant’s answer coming in, or at least he should have applied to the Court for leave to amend, or to file a supplemental bill, in an earlier stage of the proceeding. Parties could never be sure, in possessing a decree, if this practice were allowed in a case like the present, where there was nothing like surprise;—and there would be no end of supplemental bills (*l*).”

For what purpose a Supplemental Bill may be filed.

A supplemental bill may be filed for the purpose of correcting an error in the statements of the original bill. Thus, in a case mentioned by Mr. Daniell (*m*), where a bill was filed on behalf of a great number of plaintiffs interested in an annuity, to recover the arrears thereof; and after the cause was at issue, and witnesses had been examined, it was discovered that one of the plaintiffs in whose name the bill was exhibited, had died before the filing of the bill, a supplemental bill was filed by the existing plaintiffs and the representative of the deceased plaintiff against the defendants, praying to have the same benefit of the proceedings in the original suit, as they would have been entitled to had the plaintiff, who was dead, been alive when the bill was filed; and the decree was made in both suits.

To correct an error in the original statements.

So where a plaintiff, claiming under a lease, in a

(*l*) *Swan v. Swan*, 1819, 8 Price, 518. *Vide etiam Mehrrens v. Andrews*, 1839, 3 Beav. 72, 77. (*m*) *Delfosse v. Crawshaw*, 1834, 3 Dan. Ch. Pr. 156.

For what purposes a Supplemental Bill may be filed.

bill for specific performance of a covenant for renewal of the lease, by mistake set forth a supposed defect in his title under the lease, and prayed that the lease might be declared valid; and just as the bill was about to be dismissed with costs, it was discovered that the supposed defect did not exist; it was held that evidence of the true state of the title might be received, although not in issue, and even contrary to the statements in the original bill, because there was no surprise on the defendant, who being the landlord, and having a counterpart of the lease, had the same means of knowledge of the plaintiff's title under it, as the plaintiff himself had. The bill, therefore, was not dismissed without prejudice to a new bill, but leave was given to file a supplemental bill to pray specific performance on the true title; such relief being within the general prayer, and the Court having before it the whole instrument which contained the supposed defect, and on which the relief was grounded (n).

And where, in a suit by certain legatees, the original bill stated, "that although all the other legacies had been duly paid, yet no part of the legacies to the plaintiffs had been paid;" and afterwards a new co-plaintiff was added by supplemental bill, referring to the above statement, and shewing, by way of supplement, "that, whether or not the legacies (other than the legacies given to the original plaintiffs) had been paid, yet the legacy given to the new co-plaintiff had not been paid;" and a demurrer was filed, for that the supplemental bill contradicted the original bill, and that, therefore, the new co-plaintiff was an improper party; Sir J. L. Knight Bruce, V. C., said, that he was not quite satisfied that the statement in the original bill, as quoted in the supplemental bill, did amount to

(n) *Sadler v. Loratt*, 1823, 1 Moll. 162.

an allegation that all the legacies (excepting a certain number, not including the new co-plaintiff's) had been paid; but if it did, he was not aware that he was opposing either principle or authority, if he held, in the case of a legatees' bill, where the legacies affected real estate, and where the cause was directed to stand over to add as parties legatees who were absent from the record as it was originally constituted, that the plaintiffs were entitled by supplemental bill to correct an erroneous statement in the original bill, as to the mere satisfaction of debts (o).

For what purposes a Supplemental Bill may be filed.

If, however, the correction of the error in the original bill is such as, if stated, would change the issue raised by the original bill, and make a new case, it cannot, properly speaking, be called *supplemental* to the original bill, because it is, on the contrary, *subversive* of it. It would, therefore, in fact, be no *addition* to the original matter, although it might be an *amendment* of it. Its nature, therefore, is such as prevents its being brought forward by supplemental bill.

But the correction of the error must not change the original issue.

Thus, where a bill was filed for specific performance of an agreement by the defendant to sell his interest in certain property, which agreement had been entered into by the agent of such defendant under the authority of a certain letter alleged to have been written by the defendant to the agent, the defendant in his answer denied the agent's authority to enter into the agreement. After the cause was at issue the plaintiffs discovered, and stated by supplemental bill, that the letter was not written by the defendant, but by his wife acting on his behalf; and prayed for a discovery of certain other letters written by or in the name of the defendant, which they alleged would prove that the defendant had adopted the agreement. But

(o) *Strickland v. Strickland*, 1842, 7 Jurist, 32.

For what purposes a Supplemental Bill may be filed.

Sir Lancelot Shadwell, V. C., held, on demurrer, that as the object of the supplemental bill was “to change completely the issue raised by the original bill,—inasmuch as in the original bill it was averred that the material letter was written by the defendant, and in the supplemental bill it was averred that the letter was *not* written by him;—therefore, it was strictly *not supplemental*, but one which sought to make a new and different case, and was in substance *an amendment*; and that to permit it would be in fact to permit the plaintiffs to do indirectly what the new Orders intended should not be done except upon special leave.” His Honor therefore allowed the demurrer, but with liberty to the plaintiffs to make application, under the Fifteenth Order of 1828, to withdraw the replication and amend the original bill (*p*).

To strengthen the original case.

But where the object of the supplemental bill was not to change the issue raised by the original bill, but on the contrary to add supplemental matter *strengthening the case* (*q*) made by the original bill, the same learned Judge held, on demurrer, that such new matter *was* matter for a supplemental bill, and might be brought before the Court by that process.

Thus, where the purchaser of an estate alleged to be tithe-free, discovered that it was subject to the payment of tithes, and filed a bill for compensation out of the purchase money; and the cause was set down and publication enlarged; and then the plaintiff discovered that one of the vendors was actually a lessee of those tithes, and filed a supplemental bill stating that fact, in order to strengthen his claim to compensation; Sir Lancelot Shadwell, V. C., held, on

(*p*) *Colclough v. Eans*, 1831, supplemental bill, see the Appendix, 4 Sim. 76; *vide etiam* 10 Sim. 239. No. I.

(*q*) For a precedent of such a

demurrer, that the new matter, as it tended to prove the plaintiff's right to the relief originally prayed, was good matter for a supplemental bill (r).

For what purposes a Supplemental Bill may be filed.

The above cases of *Colclough v. Evans* and *Crompton v. Wombwell* have been sometimes quoted as shewing that new matter existing at the time of the original bill may be the subject of a supplemental bill, whether it seeks to change the issue raised by the original bill or not; but that in the former case the leave of the Court must be obtained to file such a bill, and that in the latter case it need not (s). It is submitted, however, that those cases do not warrant such a conclusion; for the former of them merely decides that new matter seeking to change the issue is not matter of supplemental bill, but of amendment, and cannot be brought forward at all unless it can be brought forward by amendment; and the latter merely decides that new matter not seeking to change the issue, but to strengthen the original case, may be matter for a supplemental bill.

Leave of the Court unnecessary.

However, in *The Attorney General v. The Fishmongers' Company* (t), where a motion on notice "for liberty to read a certain will as evidence at the hearing of the cause, or else for liberty to amend the information, or to file a supplemental information, by introducing the said will, and otherwise touching the same as counsel might advise," had been refused by the Master of the Rolls as being too general, but with liberty to amend the notice of motion; Lord Cottenham, C., on appeal, after confirming such refusal, said that "although the circumstances of the above cases

(r) *Crompton v. Wombwell*, 1831, 4 Sim. 628.

(s) Such were the arguments used in *Ranger v. The Great Western Railway Company*, V. C. of Eng-

land, January, 1843, not yet reported. But His Honor appears to have remained of the same opinion on the point, as that given above.

(t) 1833, 4 Myl. & Cr. 1.

For what purposes a Supplemental Bill may be filed.

To extend the prayer for relief.

Partnership accounts.

of *Colclough v. Evans* and *Crompton v. Wombwell* were different, yet it might not be very easy, perhaps, to see what line His Honor the Vice Chancellor intended to draw." His Lordship, however, did not on that occasion give any opinion as to whether leave was necessary to file the supplemental information or not, it being unnecessary to do so, as in either case the motion must be dismissed;—if leave were necessary, as being still too general;—and if leave were not necessary, as being unnecessary to be made at all.

We have seen that additional relief may be prayed by amendment of the original bill, after replication, provided the case already made warrants such prayer for additional relief. It appears that the same object may be obtained by supplemental bill. But, as has been already observed, the plaintiff must have been ignorant of his title to such additional relief when he filed his original bill, in order to be entitled to file the supplemental bill.

Thus, where, after a decree against executors to account, it was suspected from the answer of one executor that a balance was due from him to the testator's estate in respect of a partnership between them, a supplemental bill was permitted for the purpose of going into the partnership accounts before the Master (*u*).

It appears, however, that such accounts may be directed upon petition, the petitioner paying the costs of the petition, and making the inquiry at his own expense. "And indeed," said Sir John Leach, V.C., "properly speaking, the Masters ought to take partnership accounts under the general order to take accounts (*x*)."

(*u*) *Cropper v. Knapman*, 1837, 2 Y. & Coll. 338. But *quære* whether in this case the additional relief ought not to have been prayed by amendment of the original bill immediately after the filing of the answer?

(*x*) *Woolley v. Gordon*, 1829, Tambl. 11.

And where it was merely necessary to inquire whether the executor was indebted to the testator, without going into new accounts, this being the interrogatory of the Master, and not of the party, was allowed to be exhibited without supplemental bill (y). For what purposes a Supplemental Bill may be filed.

If, however, the plaintiff has not stated a case entitling him to the additional relief under the prayer for general relief; although he may file a supplemental bill stating the additional case, and praying the additional relief, before the hearing of the cause, yet it appears that the Court will not, at the hearing, allow the cause to stand over to give him an opportunity of filing such supplemental bill. Thus, where a plaintiff, entitled to an annuity charged on lands with personal covenants, prayed relief as a specific incumbrancer only, and not as a general creditor also, and made no case of personal claim by his bill, that relief was refused at the hearing; and liberty to amend or file a supplemental bill for the purpose of obtaining such relief, was also refused (z). Plaintiff cannot at the hearing make out an additional case for additional relief.

It seems, however, that if the plaintiff has mentioned the additional case, though by way of inducement only, the Court will at the hearing allow the cause to stand over for the purpose of bringing forward that additional case in a substantive manner, and adding the parties which it renders necessary. Thus, where a bill, filed to set aside a lease for forgery, alluded by way of inducement to a fraud respecting the lease, committed by certain trustees not before the Court; and, at the hearing, an issue was directed to try the forgery, and afterwards upon the cause coming on upon the equity reserved, the plaintiff abandoned the case of forgery, and tried to set up the case of fraud, the Court said Unless the additional case has been already alluded to.

(y) *Simmons v. Gutteridge*, 1806, 13 Ves. 262. (z) *Field v. Delaney*, 1828, 1 Moll. 174.

For what purposes a Supplemental Bill may be filed.

Much less after decree.

that he could not establish that case upon the original bill, but directed him to file a supplemental bill to bring forward the case of fraud in a proper manner, and to bring the trustees before the Court (a).

If at the hearing a supplemental bill will not be allowed, for the purpose of making an additional case and praying additional relief, much less can it be permitted after a decree. Thus, where a bill was filed against two surviving executors and the *supposed* representative of a deceased executor, for the administration of their testator's estate, impeaching certain accounts between the defendants and the deceased co-executor; it was discovered at the hearing that the *true* representative of the deceased executor was not before the Court, and the remedy as against his estate was abandoned. The decree accordingly restricted the account to the accounts of the defendants, and directed the account settled with the deceased co-executor not to be disturbed. Afterwards the plaintiffs filed a supplemental bill, bringing the *true* representative of the deceased co-executor before the Court, and prayed an account of the deceased co-executor's receipts; but it was held that the supplemental bill was in fact an original bill against the *true* representative, and was irregular, as making a new case (b).

Nor can the plaintiff, after decree, prosecute a case already made but neglected.

Even where the plaintiff has made out his case for additional relief, by his original bill, yet if he has neglected to prosecute that case, he cannot after decree file a supplemental bill for the purpose of prosecuting it. Thus, where a plaintiff had made a case by his bill for inquiry and account as to equitable waste, and had had an opportunity of supporting that case by evidence, but had omitted to do so; he was held not

(a) *Jones v. Jones*, 1714, 3 Atk. 110, 217.

(b) *Wilson v. Todd*, 1835, 1 Myl. & Cr. 42.

entitled to an issue as to that equity, nor to raise the question anew in a supplemental or other suit; although the bill as to that equity had not been dismissed by the decree (c). For what purposes a Supplemental Bill may be filed.

Although a supplemental bill of discovery may be filed (d) whenever a discovery is necessary and cannot be obtained by amendment of the original bill, yet this rule will not apply to cases where the plaintiff might have sought the discovery by his original bill, but neglected to do so. Thus where a bill was filed against an infant who put in an insufficient answer, which on account of the infancy could not be excepted to; and after he had attained his full age the plaintiff filed a supplemental bill interrogating as to the unanswered matters in the original bill, and also as to other matters, and prayed only a discovery; and it did not appear that he might not have interrogated in his original bill as to the new matter; it was held that the supplemental bill might be sustained so far as regarded the interrogatories in the original bill, but not as to the new interrogatories (e). For discovery.

A supplemental bill may be filed to perpetuate the testimony of witnesses on the ground of facts *discovered since the filing* of the original bill; but it has been held that the supplemental bill must state what those facts are, or else it cannot be sustained (f). To perpetuate testimony.

In the above case, however, it was said that if new evidence as to facts *stated in the original bill*, had been discovered after the commission to examine witnesses had been closed, the proper course would have been, not to have filed a supplemental bill, but to have made

(c) *Newdigate v. Newdigate*, Ch. Rep. 142.
1834, 8 Bli. N. S. 734. (e) *Knight v. Waterford*, 1833,
(d) *Usborne v. Baker*, 1817, 2 9 Bli. N. S. 331.
Madd. 379. And even after a decree to account. (f) *Knight v. Knight*, 1819, 4
Boeve v. Skipwith, 1679, 1 E. Ca. Ab. 80; 2 Madd. 1.

For what purposes a Supplemental Bill may be filed.

To add parties.

an application to the Court for permission to examine the new witnesses.

We have said that new parties may be added by amendment, after replication, provided the new averments shewing the necessity of such new parties, do not affect the case already made against the other parties. If such new averments do affect the case already made, and a replication has been filed, a supplemental bill may be filed for the purpose of making such new averments, and bringing such new parties before the Court (*g*).

Thus in *Semple v. Price* (*h*), where a bill was filed charging a surviving trustee with a breach of trust, the surviving trustee submitted, in his answer, that the personal representative of the deceased trustee was a necessary party. The plaintiff, however, did not amend her bill, but after the cause was at issue, and a commission had issued for the examination of witnesses, she filed a supplemental bill against the personal representative of the deceased trustee, stating that she had lately discovered that the breach of trust had been committed in the deceased trustee's lifetime, and praying that his estate might also be made responsible for it; and a demurrer to such supplemental bill was overruled.

And in *Roberts v. Griffith* (*i*), where a bill was filed against an administratrix, a widow, charging misapplication of the estate, but not during her husband's life, and not charging his estate therewith, and afterwards the plaintiff discovered that part of the misapplication was made during the coverture, he was allowed to file a supplemental bill bringing the deceased husband's representatives before the Court. And on

(*g*) For a precedent of such a supplemental bill, see the Appendix, No. II.

(*h*) 1839, 10 Sim. 238.

(*i*) 1842, 6 Jurist, 1077.

an objection being taken, that it would be time enough to file a supplemental bill after the Master had reported that the fact was as above alleged, Sir Lance-
lot Shadwell, V. C., said that "it was better that the supplemental bill should be filed at once, than that a decree should be first taken in the original suit, and then there might be the necessity of having a supplemental decree upon the second bill."

For what purposes a Supplemental Bill may be filed.

So where a party who was out of the jurisdiction of the Court where the original bill was filed, and against whom process was not prayed by the original bill, has since returned within the jurisdiction, he may be added by supplemental bill (*k*). And where the Master has been directed to find who are the next of kin of a testator, they may be made parties by supplemental bill, if their claim has not been raised on the record, and no one of them is in that character a party to the cause; for if their claim has been raised, and one of them is a party, the others may be heard without being made parties (*l*). And parties may be added by supplemental bill after decree, as well as before, for the purpose of carrying the decree into execution (*m*).

Where, however, the bill had been dismissed for want of prosecution as against a defendant, and at the hearing such defendant was held to be a necessary party, the Court would not allow the plaintiff to bring him before the Court again by supplemental bill, but dismissed the bill with costs (*n*).

If the plaintiff purposely omit to bring before the Court a necessary party to his suit, such party may, it appears, file a new bill against all the parties to the

Case of a plaintiff purposely omitting a party.

(*k*) Ld. Red. ed. 4, p. 165.

1719, Dick. 33.

(*l*) *Waite v. Temple*, 1823, 1 S. & S. 319.

(*n*) *Lautour v. Holcombe*, 1842, 11 Sim. 71.

(*m*) *Woodward v. Woodward*,

For what purposes a Supplemental Bill may be filed.

former suit ; but this will not be a supplemental bill, although the Court may afterwards declare that it shall be regarded in that light. It will not, therefore, have the effect of making the new party a party to the former suit. Thus where a Mr. Primrose granted five several annuities to Smith, Brown, Waite, Pearson, and Brydges, respectively, and executed a creditors' deed to trustees, the trusts of which were unknown to Smith ; Brydges filed a bill against the trustees and all the annuitants except Smith, in which suit the priorities were declared and a receiver was appointed. Afterwards Smith filed a bill praying that he might be declared first incumbrancer, and that the receiver might be restrained from making further payments to the defendants, and that if necessary his bill might be taken as a bill in the nature of a bill of review of, or of a bill supplemental to, the former cause. But it was held that an application by Smith for an injunction against the receiver was irregular, because the receiver had been appointed in a different cause from that in which the application was made ; and that the proper remedy was for the new party to ask leave, in the other suit, to enforce his legal remedies. And the Court would not on that occasion determine whether the second bill should be taken as supplemental to the first or not, it being premature to do so (*o*).

To make an infant co-plaintiff a defendant.

A supplemental bill may be filed for the purpose of making an infant co-plaintiff a defendant, if upon his attaining his majority he repudiates the suit. In *Anderson v. Wallis* (*p*) such a bill was filed after a decree dismissing the original bill, but of which decree the remaining co-plaintiffs intended to apply for a rehearing.

(*o*) *Smith v. Effingham*, 1839, (p) 1842, 6 Jurist, 907.
2 Beav. 232.

If a party to the original bill die before he has appeared to such bill, it is considered that there is, in fact, no suit in Court as against him. The imperfection, therefore, arising from the want of such a party is inherent in the suit, and must be remedied by a supplemental bill filed against the representative of the deceased party, in the same manner as it would have been filed against the deceased party himself, if he had been inadvertently omitted to be made a party to the original bill, and were still alive (*q*).

For what purposes a Supplemental Bill may be filed.

Where a party dies before appearance to the original bill.

A supplemental bill may be filed for the purpose of enabling the Court to give directions which were not prayed by the original bill, but which, after a decree has been made, the result of the proceedings under that decree has rendered proper. Thus, in *Dormer v. Fortescue* (*r*), Lord Hardwicke, after saying that he was of opinion that the original bill extended to every thing which was prayed by the plaintiff in the supplemental bill, added,—“But suppose the original bill to have been as defective as the defendant’s counsel would have it, could any thing be more proper than to bring a supplemental bill to put this matter in issue, and to supply the defects, if any, in the original bill? Supplemental bills are often brought even in aid of a decree of this Court, as in a decree to account, for want of full directions before; and directions are given, under the supplemental bill, that the new matter should be connected with the former decree. If the plaintiff’s original bill had not prayed this general relief, it was very proper to bring a supplemental bill that he might have an entire relief; and I think that

To give further directions after decree, in aid of the decree.

(*q*) *Vide Asbee v. Shipley*, 1822, 6 Madd. 296; *Stewart v. Nicolls*, 1829, 1 Tambl. 307; *Crowfoot v. Mander*, 1840, 9 Sim. 396; *Clough v. Bond*, 1841, 6 Jurist, 49. For a precedent of such a supplemental bill, see the Appendix, No. III. (*r*) 1744, 3 Atk. 132.

For what purposes a Supplemental Bill may be filed.

But the bill must not seek to change the relief.

they ought to be considered as one bill, and connected together."

The province of a supplemental bill in aid of a decree, however, is merely to carry out, and give fuller effect to, that decree, and not to obtain relief of a different kind, and on a different principle;—the latter being the province of a supplemental bill in nature of a bill of review, which will be discussed in the next chapter, and which cannot be filed without leave of the Court, as the supplemental bills hitherto considered may be. Where, therefore, in a suit for the execution of the trusts of a will, the original bill had prayed, and the decree had directed, merely the common accounts against the executors; and the plaintiff afterwards filed a supplemental bill without leave of the Court, alleging that, in taking the accounts in the Master's Office, he had discovered for the first time that the executors had been guilty of misconduct, and praying relief against them in respect of their wilful neglect and default; this being relief of a different kind from what was before prayed, the supplemental bill was ordered to be taken off the file for irregularity (*s*).

So where a decree had been made for the sale of the real estate of a testator for the payment of his debts, of which real estate it was supposed the testator had died seised in fee simple; and on the investigation, by a purchaser, of the title to part of the estates, an old entail was discovered, which had never been barred, and under which the plaintiff was tenant in tail; a supplemental bill was filed by the plaintiff to rectify the decree in the former suit, and praying the neces-

(*s*) *Hodson v. Ball*, 1842, 1 Phill. 176, affirming *S. C.* 1841, 11 Sim. 456.

sary directions and declarations of the Court for that purpose. But Lord Cottenham, C., said,—“If the bill were regular, the relief sought would be granted by the Court; but the plaintiff must, in that case, have shewn, that with ordinary diligence he could not have earlier known the circumstances now brought forward by him. The present course of proceeding, however, is irregular, and, therefore, I shall make a decree rectifying the decree in the former suit, only on condition of the plaintiff paying the defendants their costs of this suit (*t*).”

For what purposes a Supplemental Bill may be filed.

Let us now consider the general form of the bill in question.

Form of the Supplemental Bill.

Lord Redesdale says that a supplemental bill must state the original bill, by which he probably means that it must state *the filing* of the original bill; but it has been sometimes construed to mean that the supplemental bill must restate the *statements* in the original bill. To put a stop to this practice it is declared by the Forty-ninth Order of 1841, that it shall not be necessary in any supplemental bill to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it (*u*).

Original statements.

The exception contained in the concluding words makes it necessary for us to inquire how far, and under what circumstances, the matter of the original bill must be noticed in the supplemental bill.

Now the object of the supplemental bill being merely to make an addition to the original bill, there can be no advantage in telling the original parties any thing which they have already been interrogated to and

(*t*) *Dyneley v. Hartley*, 1838, 2 Jurist, 229.

(*u*) Mr. Daniell, in his “Observations” on these Orders, says,

p. 97, that he “does not perceive that this Order effects any material alteration in the present practice of drawing bills of this description.”

Form of the
Supplemental
Bill.

answered; whilst, with respect to new parties, as they will be called upon to answer the original bill, there will be no reason for stating the whole case over again in the supplemental bill, for their benefit. Such statements are, therefore, *primâ facie*, surplusage and improper, and productive of useless expense. In *Anderson v. Wallis* (x), however, Sir Lancelot Shadwell, V. C., said,—“ You must introduce some statement showing you have an interest.—I used to say, *the plaintiffs filed their original bill, thereby stating matters whereby it appeared, as the fact is* (y), *that the plaintiffs are entitled to the relief they prayed.*”

In *Ong v. Truelock* (z) Sir Anthony Hart expressed his decided approbation of Lord Eldon’s having expunged from a supplemental bill even a very short restatement of the original bill, saying that it was quite sufficient to state the mere filing of it; or the decree, if after decree. But it is apprehended, that although this may be sufficient in some instances, yet in others something more must be stated, in order to make an intelligible story in the supplemental bill.

On the whole, it is apprehended that no general rule can be laid down on this point, except that as little as possible of the original bill must be stated, consistently with making the supplemental bill intelligible.

Former pro-
ceedings.

The supplemental bill must then go on to state the proceedings which have taken place in the suit, and the decree, if any has been made. In many instances the story of the supplemental bill will be sufficiently

(x) 1842, 6 Jurist, 907.

(y) But *quære* whether the words “as the fact is,” would not have the effect of putting the whole case in issue again? Such is the effect

ascribed by Master Dowdeswell to a similar expression in *Woods v. Woods*, 1839, 10 Sim. 197.

(z) 1828, 2 Moll. 31.]

intelligible by merely mentioning the original bill, and then setting out the decree.

Form of the Supplemental Bill.

The supplemental bill must then state "by way of supplement,"—for such is the form of words to be used on this occasion,—the new matter which has been discovered since the proceedings in the cause. It must also call upon the defendants for an answer in the usual way; and if it brings a new person before the Court who ought to have been a party to the original bill, or a person who stands in the place of a person who was made a party to the original bill, but died before appearing to it (a), it must call upon such party to answer the original bill also, or rather such of the interrogatories to it as the plaintiff points out.

Supplemental matter.

Calls for answer to itself,

and for answer to original bill.

Mr. Daniell says (b) that a new party who ought to have been a party to the original bill, cannot be called upon, by the supplemental bill, to answer the original bill; quoting as an authority the case of *Baldwin v. Mackown* (c). With deference, it is submitted that this case, of which the report is very slender, does not decide that a necessary party, brought before the Court by supplemental bill, may not be called upon to answer the original bill; but merely that in that particular instance the new party ought not to have been brought before the Court by supplemental bill. At any rate it is submitted that the usual practice in these cases is to call upon a new party, who ought to have been a party to the original bill, to answer that original bill.

The supplemental bill, if it brings a new defendant before the Court, must pray that the plaintiff may have the same relief from his original bill as if such

Prayer of the bill.

(a) *Asbee v. Shipley*, 1822, 6 v. *Bond*, 1841, 6 Jurist, 49. Madd. 296; *Stewart v. Nicolls*, 1829, 1 Taml. 307; *Crowfoot v. Mander*, 1840, 9 Sim. 396; *Clough* (b) 3 Dan. Ch. Pr. 176. (c) 1754, 3 Atk. 817.

Form of the
Supplemental
Bill.

new defendant had been a party to the original bill ; or, if the new defendant stands in the place of a party who died before appearing to the original bill, the same relief as he might have had against such former party, if he had appeared to the original bill, and were still alive ; or, if the supplemental bill brings forward new matter only, the same relief, in respect of the new matter, as he would have had if such new matter had been stated in the original bill ; and it must also pray for relief adapted to the new circumstances of the case.

Case of a
change of name
in the plaintiff.

A plaintiff may file a supplemental bill under a different name from that under which he filed the original bill, if such latter name was a wrong one, without prejudicing the evidence taken in the original suit. Thus, where a woman filed a bill under the name of Ann Giles, widow ; and it appearing that John Penfold her husband was alive, she was ordered at the hearing to make her husband a party, and did so by supplemental bill, calling herself Ann Penfold, *alias* Ann Giles, by her next friend ; it was held that this was not such an alteration of the frame of the record as to make the evidence in the first cause inadmissible at the hearing of the two causes (*d*).

Signature of
counsel.

A supplemental bill must be signed by counsel, and is filed in the same manner as an original bill.

What party
may file the
Supplemental
Bill.

We will now consider who may file the bill in question, and who will be the proper parties to it.

As to the first question, we must recollect that a supplemental bill of this nature is a substitution for an amendment of the original bill, and partakes in some degree of the character of such a proceeding. As therefore no one but the plaintiff can amend his original bill, so it is apprehended that no one but the

plaintiff can file a supplemental bill for the same purpose.

What party
may file the
Supplemental
Bill.

It is true, however, that where the supplemental bill is filed not merely for the purpose of introducing new matter, but in order to add parties to the suit, the plaintiff may join such parties with himself as co-plaintiffs in the supplemental bill, instead of making them defendants to it. Thus, where a suit had been instituted in the names of several co-plaintiffs, and it was discovered that one of them had been in fact dead at the time of such institution, the executor of the deceased co-plaintiff was allowed to be joined with the original co-plaintiffs in filing a supplemental bill to correct the error (*e*). And we have already seen that where a bill by certain legatees stated that all the other legatees had been paid their legacies, and it was afterwards discovered that one of those other legatees had not been paid his legacy, he was allowed to join with the original plaintiffs, as a co-plaintiff, in filing a supplemental bill for the purpose of correcting the error (*f*).

Next as to the question of parties to a supplemental bill.—If the bill is filed merely for the introduction of *new matter*, it is obvious that all the parties to the original bill must be parties to the supplemental bill, either as plaintiffs or defendants. Where, however, the supplemental bill is filed for the purpose of adding *parties*, the question whether all or any of the original parties must be made parties to such a bill, is sometimes one of difficulty.

Parties to the
Supplemental
Bill.

If the original suit was instituted by several plaintiffs, they must all be made parties to the supplemental bill, either as plaintiffs or defendants ; because

Original co-
plaintiffs.

(*e*) *Vide Delfosse v. Crawshaw*,
1834, 3 Dan. Ch. Pr. 156.

(*f*) *Strickland v. Strickland*,
1842, 7 Jurist, 32.

Parties to the
Supplemental
Bill.

Original de-
fendants.

a co-plaintiff has no right to take any step in a suit without giving the others an opportunity of assenting thereto or dissenting therefrom (g).

But, as to the original *defendants*, it is not always a matter of course that they are to be parties to the supplemental bill. The rule on this subject is in theory a very simple one, although the application of it to practice is attended with difficulty. The original defendants need not be made parties to the supplemental bill unless they have an interest in disputing the new matter alleged in the supplemental bill: and even though they may have an *interest* in disputing such new matter, yet, if by reason of former admissions in their answers, or otherwise, they have no *power* of disputing it, this will dispense with the necessity of making them parties.

The case of *Bignall v. Atkins* (h) is an instance of the original defendants not being considered necessary parties to the supplemental bill. In that case a party was entitled under a will to all the monies in the hands of John and Abraham Atkins, consignees; who, however, claimed to deduct a part thereof on account of a certain loss. The plaintiff thereupon filed a bill praying that, if such deduction were proper, the amount might be made good out of the testator's assets. It appeared from the answers of John and Abraham Atkins, that the executor, another defendant, was out of the jurisdiction; and that Abraham Atkins had become a bankrupt before the filing of the bill; and upon an objection being made at the hearing for want of parties, the cause was ordered to stand over with liberty to the plaintiff to add proper parties by a sup-

(g) *Vide* the dicta of Lord Eldon in *Fallowes v. Williamson*, 1805, 11 Ves. 306, and quoted more fully, *post*, Chapter VII. which, although

delivered in a case of revivor, are, it is apprehended, equally applicable to a case of supplement.

(h) 1822, 3 Madd. 369.

plemental bill. Afterwards, one John Allen having taken out a limited administration to the testator, the plaintiff filed a supplemental bill against him, and also against Kymer and Jackson, the assignees of Abraham Atkins; and upon an objection being taken by John Atkins, at the hearing of the original and supplemental suits, that he had not been made a party to the supplemental bill, Sir John Leach, V. C., overruled it; observing that "The purpose of the supplemental bill is to bring new parties before the Court who have an interest in the matter of the original bill. There are no new facts except those which show the relation of the new parties to the subject of the suit;—that Abraham Atkins became a bankrupt, and that the new defendants, Kymer and Jackson, are his assignees, and that the defendant John Allen is the limited administrator of the testator. If any purpose of justice requires that John Atkins should be at liberty to join issue with the plaintiff upon these supplemental facts, then it is fit that he should be made a defendant. It cannot be useful to him to join issue with the plaintiff on the facts of the bankruptcy of Abraham Atkins and the alleged choice of assignees, because in his answer to the original bill he makes the same statement; nor can it be useful to him to join issue on the fact of the limited administration to John Allen, for that fact can only be proved by the letters of administration, and is conclusively proved by their production. My opinion, therefore, is, that the defendant, John Atkins, has no such interest in the supplemental facts as makes it necessary for him to be a party to the supplemental bill."

Parties to the
Supplemental
Bill.

So where a plaintiff filed a supplemental bill to add a party whom the defendant had insisted, by his answer, to be a necessary party, because he was entitled

Parties to the
Supplemental
Bill.

to be reimbursed by such party what he (the defendant) might be decreed to pay to the plaintiff; it was held, that he need not make the original defendant a party to such supplemental bill, "because it was filed for the purpose of being heard with the original bill, and for the same relief as the original (*i*)."⁵ In other words, the original defendant could not dispute the truth of the allegations in the supplemental bill, because he had himself insisted on them by his answer.

In the above case of *Greenwood v. Atkinson*, Sir Lancelot Shadwell, V. C., is reported to have said,— "Where a supplemental bill is filed for the purpose of putting in issue a new fact, or an old fact newly discovered, it is right to make the original defendants parties to it; but where the case consists of facts which existed prior to the filing of the original bill, the defective party is to be brought before the Court by supplemental bill, alone." There is some little obscurity in this passage, for the expression "facts which existed prior to the filing of the original bill" would seem to *include* "old facts newly discovered." But it is presumed that, by the former of these expressions, His Honor intended facts which existed prior to the filing of the original bill, and have been already put in issue as to the original defendants, either by the bill, or, as in this case, by the defendant's answer.

So where a bill was filed charging a surviving trustee with a breach of trust, who by his answer submitted that the personal representative of his late co-trustee was a necessary party; and after the cause was at issue, the plaintiff filed a supplemental bill against such personal representative, stating that she had

(*i*) *Greenwood v. Atkinson*, 1832, *Russell*, 1838, 1 C. P. Cooper, 5 Sim. 419. *Vide etiam Lloyd v.* 258.

lately discovered that the breach of trust was committed in the deceased trustee's lifetime; such supplemental bill was filed against the personal representative alone, without making the surviving trustee a party (*k*). Parties to the
Supplemental
Bill.

So where a defendant died before he had appeared to the original bill, and his representative was brought before the Court by supplemental bill; and an objection was made that the original defendants were not made parties to it; Sir Lancelot Shadwell, V.C., said,—“Inasmuch as the deceased party never had appeared, it was not necessary, for the purpose of making the suit perfect, to file a bill of revivor against his representatives; the way to revive it, as against them, was by supplemental bill; and as his death did not alter the interests of any of the other defendants, it was not necessary to make them defendants to it.” Again;—“If a supplemental bill be only for the purpose of bringing a party before the Court upon a *given case*, it is sufficient to make that individual alone a party, without making the other defendants parties thereto; but if the supplemental bill be filed to bring *new facts* before the Court, then the old defendants to the record must also be made parties to the supplemental bill; but here the representative was made a party in respect of the antecedent facts upon record.” The objection therefore was overruled (*l*).

So where a vendor filed a bill against a purchaser for specific performance of a contract to purchase an estate, not having herself the power of conveying the estate, but having obtained the consent of those who had the power, who, however, were not parties to the suit; and at the hearing she was directed to bring

(*k*) *Semple v. Price*, 1839, 10 Sim. 238.

(*l*) *Clough v. Bond*, 1841, 6 Jurist, 49, 51.

Parties to the
Supplemental
Bill.

those persons before the Court by supplemental bill; an objection that the purchaser was not made a party to such supplemental bill appears to have been overruled, the usual reference to the Master as to title being directed notwithstanding (*m*).

So where a mortgagee of a term of years filed a bill for an account, and for a foreclosure or sale of the mortgaged estate, and having omitted to make the executors of the trustee of the term parties to the original bill, brought them before the Court by a supplemental bill, an objection was made that the original defendant, the mortgagor, was not made a party to it. But Sir James Wigram, V. C., said,—“The practice [as to a party’s appearing at the hearing and consenting to be bound by the decree] as I collect it from the decided cases, is, that if a person is named as a party to a bill, and has not appeared, or not even been served with a subpoena to appear, the Court will, with the plaintiff’s consent, permit such party to appear at the hearing, and become a party to the decree by submitting to be bound by it. But where the party who appears at the hearing, and offers to be bound by the decree, is not named as a party to the bill, the Court will not, unless with the consent of all the parties to the cause, permit him to become a party to the decree. * * * * *

The question then is, whether the mortgagor ought to have been made a party to the supplemental bill. I do not mean to decide any general proposition with respect to the cases which require that the defendants to an original bill should be parties to a supplemental bill. If compelled, which I am not, to express an opinion upon that point, I should rather incline to say, that the cases in which the parties to the original bill were necessary parties to a supplemental

bill, were those in which the interests of the original defendants required that such new parties should be before the Court, and that the cases in which the parties to the original bill were not necessary parties to the supplemental bill, were those in which the new parties are brought before the Court in respect of the interest of the plaintiff or of the new defendants. It is sufficient, however, in this case to say that the decision in *Greenwood v. Atkinson* (*n*), which was come to after argument, was followed in *The Attorney General v. Pearson* (*o*), and in *Semple v. Price* (*p*), and was not disapproved of by Lord Langdale in *Feary v. Stephenson* (*q*). Upon these cases I observe only that the practice which they establish cannot possibly work injustice in this case. The original and supplemental causes are heard together. The mortgagor has a right to insist that the decree shall provide for the reconveyance of the estate upon payment of the mortgage money, and it is only for the purpose of such reconveyance that the executors of the trustee are necessary parties to the cause. If the Court cannot by means of the original or supplemental bill make such a decree as the mortgagor is entitled to, the suit must fail; but if the original and supplemental bill do enable the Court to make the decree to which the mortgagor has a right, it is obvious that he has no reason to complain of the form of the record. In this case the executors of the trustee are brought before the Court, and are willing to do all which the exigencies of the case may require, and the ground of objection, except as a matter of form, does not exist (*r*)."

Lastly, Lord Redesdale, upon the authority of Lord

(*n*) 1832, 5 Sim. 419, and *supra*.

(*o*) 1835, 7 Sim. 290.

(*p*) 1839, 10 Sim. 238, and *supra*.

(*q*) 1838, 1 Beav. 42, and *post*, Chapter XI.

(*r*) *Dyson v. Morris*, 1842, 1 Hare, 413.

Parties to the
Supplemental
Bill.

Hardwicke, lays down the rule that where the object of the supplemental bill is merely to bring formal parties before the Court as defendants, the defendants to the original bill need not in any case be made defendants to the supplemental bill(s). "In a decree to account," says Lord Hardwicke, "if during the account any formal party, as trustees, should be wanting, it is not necessary to make the original defendants parties to the supplemental bill; nor, when the cause comes on to be reheard, can those defendants object for want of parties (t)."

The case of *Jones v. Howell* (u), on the other hand, is an instance of the original defendants being considered to be necessary parties to the supplemental bill. There the bill was filed by the executor of a deceased lady, who was alleged to be the sole next of kin of an intestate, against the personal representative of that intestate, in order to have the estate administered. A reference was made to the Master, on interlocutory order, to inquire who were the next of kin of the intestate at the time of his decease; and the Master found that the plaintiff's testatrix, and one Jane M. were the next of kin: Jane, however, had died before the institution of the suit. It thus appeared that the personal representative of Jane ought to have been a party to the suit at the commencement; and accordingly the plaintiff filed a supplemental bill against a Mr. Godsall, who was that personal representative, making no other person a party to the bill. At the hearing, an objection was taken by the original defendant that he ought to have been made a defendant to the supplemental bill, and Sir James Wigram, V. C., allowed the objection.

(s) Ld. Red. ed. 4, p. 76.
(t) 3 Atk. 217.

(u) V. C. Wigram, March 27,
1843.

His Honor observed, that if a decree for an account were made at the hearing, it would convert Godsall into a plaintiff as against the objecting defendant, and yet such defendant would have been precluded by the course of the suit from making any defence against Godsall's claim. Liberty might indeed be given at the hearing to make a defence, but then the original defendant would have the disadvantage of coming unprepared to the hearing, knowing nothing of the supplemental bill, and not aware that any defence would be necessary, or that it would be requisite to ask for leave to make one. After referring to *Dyson v. Morris*, already cited, His Honor observed, that where the new defendant is brought before the Court, only to contest a question with the plaintiff, the old defendants need not be parties; and that the same was the case where the new defendant is brought in respect of a claim made by him, in which the other defendants are not concerned; but that in other cases he thought that the old defendants ought to be made parties:—that the admission by the plaintiff that some opportunity must be given to the representatives of the intestate, to contest Jane's claims, went a great way in support of the objection. The case of *Feary v. Stephenson* (x) also supported it; but in the case of *Dyson v. Morris* (y) His Honor was able to give all the relief wanted without making the original defendants parties. The difficulties in these cases arose where the rights of co-defendants remained to be litigated; for one decree in both suits would bind the representatives unjustly. But then the case of *Greenwood v. Atkinson* (z) was cited as an authority to the

Parties to the
Supplemental
Bill.

(x) 1838, 1 Beav. 42, and *post*, *supra*, in this chapter.
Chapter XI.

(z) 1832, 5 Sim. 419, and *supra*,

(y) 1842, 1 Hare, 413, and in this chapter.

Parties to the
Supplemental
Bill.

contrary. Now each defendant had a right to state on the record his whole case against every other party; and *Greenwood v. Atkinson* did not oppose this doctrine, whilst *Feary v. Stephenson* directly supported it: and if there was any difference between the present decision and the decision in *Greenwood v. Atkinson*, it was not as to the principle, but as to the application of it. The objection, therefore, must be allowed, being an objection of substance, and not merely of form.

Mr. Daniell, in his treatise on Chancery Practice, distinguishes defendants into those having concurrent interests with the plaintiff, and those having adverse interests. Adopting this distinction, it would seem that, where a supplemental bill is filed against a new defendant having a concurrent interest with the plaintiff, as in the above case of *Jones v. Howell*, the old defendants who have adverse interests to the plaintiff ought to be made parties to the supplemental bill; and perhaps it equally follows, that where the new defendant is one having an adverse interest to the plaintiff, such of the old defendants, if there are any, as have concurrent interests with the plaintiff, ought to be parties to the supplemental bill.

Subpœna.

The subpœna taken out upon the supplemental bill is a subpœna to appear and answer; and if the supplemental bill calls for an answer to the original bill, the defendant must answer the original bill, although the subpœna taken out is a subpœna requiring an answer to the supplemental bill only (*a*). The form of the subpœna is given in the Appendix to the General Orders of 1833. It is sued out, and served, in the same manner as an ordinary subpœna, and if the defendant is a Peer, he is served with the usual letter

(*a*) *Vigers v. Audley*, 1838, 9 Sim. 403.

missive and an office copy of the supplemental bill; and if the supplemental bill requires him to answer the original bill, he must be further served with an office copy of the original bill, and if not so served, process for default of answer will be irregular (*b*). But if the defendant is not a Peer, he must procure an office copy of the supplemental bill, and of the original bill also if required to be answered, for himself.

Subpœna.

Service of subpœnas on the clerk in Court in the original cause, has been held not to be good service in the supplemental cause (*c*).

The means of defence to a supplemental bill are the same as those to an original bill; namely, demurrers, pleas, and answers.

Defence.

There seems to be no other way of making an objection to a supplemental bill. Thus in *Bowyer v. Bright* (*d*) a motion for taking a supplemental bill off the file for irregularity on the ground that it did not state supplemental matter, was refused, the Court observing that the proper course in such a case was to demur. It has also been said that an objection for want of parties (*e*), or that the supplemental matter is not newly discovered (*f*), cannot be made at the hearing, but must be taken by plea or demurrer put in previously to the hearing.

Objection by motion irregular.

Pleas and demurrers to supplemental bills are subject to the same rules, both with regard to their form and substance, and to the practice arising upon them, as pleas and demurrers to original bills.

Pleas and demurrers.

If a defendant to a supplemental bill neither de-

Answer.

(*b*) *Vigers v. Audley*, *ubi supra*. solicitors of the parties.

(*c*) *Bond v. Newcastle*, 1791, (*d*) 1824, 13 Price, 316.

3 Bro. C. C. 386; and now see (*e*) *Jones v. Jones*, 1745, 3 Atk. 217.

Orders III. and XVI. Oct. 1842; by which the clerks in Court are abolished, and their duties, in these respects, transferred to the (*f*) *Llewellyn v. Mackworth*, 1740, 2 Atk. 40.

Defence.

murs nor pleads to it, he must answer it, as in the case of an original bill. If, however, there is any matter in the supplemental bill which is properly the subject of demurrer or plea, the defendant may by his answer claim the same benefit of it as he would have been entitled to, if he had put it in by way of demurrer or plea (*g*).

The form of an answer to a supplemental bill, and the manner of putting it in and filing it, are the same as in the case of an answer to an original bill.

Where a defendant to a supplemental bill is called upon to answer the original bill also, the usual practice is to include the answer to the original bill and the answer to the supplemental bill in the same answer. The answer is then intituled as the answer to both bills (*h*). It appears, however, that the answers may be separated if the defendant prefers it (*i*).

Process.

The process for compelling appearance and answer to a supplemental bill is the same as that which is in use with respect to original bills; and the same practice obtains in regard to exceptions to answers.

Where one of two defendants, having failed to put in his answer to the original bill, was attached and sent to jail, but was afterwards discharged, though not brought up under Sugden's Act, and no further proceedings were then had against him; and after decree the plaintiffs filed a supplemental bill against him, to which he appeared but put in no answer, whereupon another attachment issued against him; and ultimately the bill was taken *pro confesso* against him; an objection that the cause had not been properly brought to a hearing against him, the plaintiffs having proceeded against him on the supplemental

(*g*) 3 Dan. Ch. Pr. 184.

(*i*) *Sayle v. Graham*, 1831, 5

(*h*) *Vigers v. Audley*, 1838, 9 Sim. 8.
Sim. 408.

bill only, was overruled, the decree in the supplemental suit reciting that it had become impossible to go on with the original decree (*k*).

Defence.

The supplemental cause may be either set down to be heard on bill and answer, or a replication may be filed, and a subpœna to rejoin served, as in the case of an original bill.

Replication.

When the supplemental bill introduces supplemental matter, merely to sustain the relief sought by the same plaintiff from the same defendant as by the original bill, it has been said that there is only one record, one replication, and one cause to be set down; so that if there has been no replication in the original suit, a general replication will apply to the whole record, and not merely to the original bill (*l*). From this case it must, it is presumed, be inferred that when the supplemental bill brings a *new party* before the Court, before a replication has been filed in the original suit, such replication will not extend to the supplemental suit.

If the new matter in the supplemental bill is not admitted by the defendant's answer, it must be proved, otherwise the supplemental bill will be dismissed with costs. This proof must be obtained by the examination of witnesses, as in the case of an original bill.

Evidence.

If publication has not passed in the original suit, then if no witnesses have been examined on interrogatories exhibited in the original cause, interrogatories may be exhibited and witnesses examined as to the matters in issue in the original suit, and also those in issue in the supplemental suit, at the same time (*m*). If witnesses have been already partly examined on interrogatories exhibited in the original suit, the

Interrogatories.

(*k*) *Hughson v. Cookson*, 1839, Madd. 427.

3 Y. & Coll. E. E. 579.

(*m*) 3 Dan. Ch. Pr. 186.

(*l*) *Catton v. Carlisle*, 1820, 5

Evidence.

Court will on motion give leave to add to those interrogatories; but such new interrogatories must contain nothing but what relates to the supplemental suit (*n*).

If publication has passed in the original suit, separate interrogatories must be exhibited in the supplemental suit, which must be strictly confined to the new matter and not extend to matters in issue in the original suit; and if any witnesses are examined as to such matters, their depositions cannot be read at the hearing (*o*).

If interrogatories have been exhibited and evidence taken in the original suit, before the filing of the supplemental bill, such evidence may be made use of in both suits (although of course not intituled in both suits), because a supplemental suit is merely a continuation of the original suit. Thus in *Giles v. Giles* (*p*), depositions taken in the original suit were allowed to be read at the hearing of both causes. But it is apprehended that the evidence taken in the original suit will be good as against the parties to the original suit only, and not as against any new party who may be brought before the Court by the supplemental bill.

If the interrogatories are exhibited after the filing of the supplemental bill, they must be intituled in both suits. In this case, however, if interrogatories are exhibited by any of the original defendants who are no parties to the supplemental bill, they may intitule them in the original cause only; but if they have joined with the new defendant in the commission to examine witnesses, or if they have consented to the order for such commission, the interrogatories and depositions must be intituled in both suits, following the

(*n*) 3 Dan. Ch. Pr. 186.

(*o*) *Bagnall v. Bagnall*, 1725, C. 504; *Forum Rom.* 109.

12 Vin. Ab. 114, pl. 9; *Cock-*

burne v. Hussey, 1792, 2 Ridg. P.

(*p*) 1836, 1 Keen, 685.

title of the commission, or the depositions will be suppressed (q). Evidence.

If, before the filing of the supplemental bill, the original bill has proceeded beyond bill and answer, so that witnesses have been examined, orders made on motion, or a decree made at the hearing, it is apprehended that any new defendant who may be brought forward by the supplemental bill, is in no wise bound by such proceedings, having had no opportunity of canvassing them; but that they must all be repeated against such new defendant, unless he will consent to be bound by them. Thus where certain mortgage and judgment creditors filed a bill for payment of their debts out of the estates of their deceased debtor, which he had devised to his son for life, with remainder to his son's children in tail, and after a decree for an account, and an order on further directions, the plaintiffs discovered that a tenant in tail had been born before the filing of the original bill, and filed a supplemental bill against him; it was held that the infant was not bound by the accounts taken, but that they must be taken over again. Liberty, however, was given to the Master, in this case, to adopt any of the former accounts, if he should judge them to be beneficial to the infant (r).

If there has been no decree in the original suit before the filing of the supplemental bill, both suits will be heard together, and there will be one decree made in both suits (s); but if there has been a decree in the original suit before the filing of the supplemental bill, then a new decree must be made in the supplemental suit; for which purpose the supplemental suit must be set down alone; or if there has been a decree in

Whether the new defendant is bound by the former proceedings.

Hearing and Decree.

(q) *Pritchard v. Foulkes*, 1839, Sim. 167.

2 Beav. 133.

(s) Ld. Red. ed. 4, p. 75.

(r) *Baillie v. Jackson*, 1839, 10

Hearing
and Decree.

the original suit, which is not final, it may be set down to be heard with the original suit on further directions (*t*).

When the supplemental suit is to be heard with the original suit, the Court will, on application, order the former to be advanced (*u*).

(*t*) Ld. Red. ed. 4, p. 75 ; and (*u*) Seton. 386.
Seton, 386.

CHAPTER III.

OF THE REVERSAL OF DECREES ON SUPPLEMENTAL
MATTER.

THE reversal of a decree on the statement of supplemental matter omitted in the original bill, although properly included in that part of our subject which treats of imperfections originally inherent in the frame of a suit, yet being subject to certain conditions not imposed in respect of other objects for which the sort of bill we are now discussing may be filed, will be considered with more convenience in a separate chapter.

Nature of
the Remedy.

It may happen that after a decree has been pronounced in a cause, a party aggrieved by the decree may discover new matter of such a nature as would in his opinion have materially influenced the decree, if it had been brought before the Court in due time. The decree may be right with reference to the matter before the Court, so as to preclude *appeal*, and yet it may be unjust, because founded on false or incomplete premises. When this is the case the rules of the Court furnish means of bringing the new matter before it, and of obtaining an examination and reversal or correction of the decree, if proper.

If the party aggrieved by the decree is the *plaintiff*, the omission of the supplemental matter in the original bill may properly be ranked among those species of imperfection which are originally inherent in the suit;

Nature of
the Remedy.

but if the party aggrieved is a *defendant*, the omission of the supplemental matter in his answer can hardly be termed an imperfection originally inherent in the suit. As, however, the remedy for such omission is the same whether made use of by plaintiff or defendant, the doctrine, in either case, respecting the reversal of decrees on discovery of new matter, may very properly be considered in the present treatise.

Bill of review.

If the decree has been signed and enrolled, whereby it has become a record of the Court, (which practice, however, has nearly fallen into disuse), the party wishing to reverse it attains his object by filing a new bill, called a bill of review (*a*); and, as this bill prays that the decree may be reviewed and reversed, and is heard independently, as it were, of the original bill, it is usually ranked among original bills, and is therefore foreign to the subject of this treatise. But if the decree has not been signed and enrolled, it may be altered or reversed upon a *rehearing* of the cause; and in this case a supplemental bill must be filed to bring forward the new matter and make the original cause perfect. Such a supplemental bill is called a supplemental bill in the nature of a bill of review.

Rehearing and
supplemental
bill in nature
of a bill of
review.

Leave of the
Court.

Before we consider the form of the supplemental bill, it must be premised that such a bill cannot, any more than a bill of review, be filed without the leave of the Court (*b*); and this leave is to be obtained by a petition presented for that purpose, and will not be granted without an affidavit that the new matter could not be produced or used by the party claiming the benefit of it, in the original cause. The affidavit

Affidavit.

(*a*) *Standish v. Radley*, 1741, 2 Atk. 178. A defendant may, if he pleases, enrol a decree, in order to enable him to bring a bill of re-
view; *Carrington v. Holly*, 1755, cited Dick. 612.
(*b*) Order, Oct. 17, 1741, 2 Atk. 139.

must also state the new matter intended to be brought forward, in order that the Court may exercise its judgment upon its relevancy and materiality (*c*). Nature of the Remedy.

In *Hyde v. Donne* (*d*), it is said that a petition for a rehearing, or for leave to file a bill of review, is bad for uncertainty. But in *Partridge v. Usborne* (*e*), where the prayer of the petition was for leave to file a bill of review, or a supplemental bill in the nature of a bill of review, as the petitioner should be advised, the order was made according to the prayer. It is apprehended, however, that the more correct way would be to state, in the petition, whether the decree has been enrolled or not, and to say positively which sort of bill it is wished to file.

If the bill is filed without the leave of the Court, the proper course is to move that it may be taken off the file for irregularity (*f*).

The leave of the Court having been obtained, the person wishing to correct the decree must present the usual petition for a rehearing of the cause (*g*): and on this petition being answered, he must file the supplemental bill in the nature of a bill of review for the purpose of bringing the new matter before the Court, and supplying the defect which occasioned the wrong decree in the former suit (*h*). The prayer that the decree may be reviewed and reversed is made by the petition of rehearing, and the supplemental bill in

Respective prayers of the petition and supplemental bill.

(*c*) Ld. Red. ed. 4, p. 84. For precedents of the petition, affidavit, and order, see the Appendix, Nos. IV. V. and VI. There must also be a deposit, which, with the deposit upon obtaining a rehearing of the decree, shall make up 50*l*. Order, Oct. 17, 1741; 2 Atk. 139; *Anon.* 1725, 2 P. W. 283; *Loubier v. Cross*, 1753, Dick. 223.

(*d*) 1795, 2 Anst. 551.

(*e*) 1828, 5 Russ. 195; Reg. Lib. 1827, B. fol. 2249.

(*f*) *Hodson v. Ball*, 1842, 1 Phill. 177, affirming *S. C.* 1841, 11 Sim. 456.

(*g*) *Moore v. Moore*, 1755, 2 Ves. sen. 598.

(*h*) *Llewellyn v. Mackworth*, 1740, 2 Atk. 40; *Standish v. Radley*, 1741, 2 Atk. 177.

Nature of
the Remedy.

nature of a bill of review merely prays that the cause may be heard with respect to the new matter at the same time as it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires (*i*).

It is not stated, in any of the cases, or in any of the books of practice, whether the petition for rehearing is to be presented *before* or *after* the filing of the supplemental bill: but from the nature of the respective prayers of the petition and supplemental bill, it is apprehended that the petition of rehearing must be presented (*i. e.* left with the secretary) and answered, *before* the filing of the supplemental bill in the nature of a bill of review (*k*).

Although, as we have seen, bills of review on discovery of new matter are not properly within the limits of this treatise, yet as the rules and principles applicable to those bills are for the most part equally applicable to supplemental bills in nature of bills of review, we shall in the course of this chapter have occasion to notice much of the practice respecting the former sort of bill, as well as that which is peculiar to the latter sort.

It appears that a bill of review cannot be filed by the assignee or devisee of any party to the suit, for want of privity (*l*); nor can it be filed by a party in whose favour the decree was pronounced (*m*); nor if the decree was taken by consent (*n*); nor will it lie

(*i*) *Ld. Red. ed.* 4, p. 92; *Moore v. Moore*, 1755, 2 Ves. sen. 596; *Dick*. 66; *Perry v. Phelps*, 1809, 17 Ves. 177.

(*k*) For precedents of the petition for rehearing, and the supplemental bill in the nature of a bill of review, see the Appendix, Nos. VII. and VIII.

(*l*) *Tirrel v. Moreton*, 1669, 1 C. C. 123; *Hartwell v. Townsend*, 1768, 2 Bro. P. C. 107.

(*m*) *Glover v. Portington*, 1664, Freem. 182; *sed contra*, *S. C.* 1 C. C. 53; and *Vendebende v. Livingston*, 1674, 3 Swanst. 625.

(*n*) *Webb v. Webb*, 1676, 3 Swanst. 658.

against persons who were not parties to the original bill (*n*).

Nature of
the Remedy.

The new matter must be *relevant*; for its being new matter merely will not warrant a bill of review (*o*).

Conditions
of the Bill.

It must also be *material*, and such as, if unanswered, would clearly entitle the party bringing it to a decree in his favour; or at least raise a question of such nicety and difficulty as to be a fit subject of judgment in a cause. Therefore where a purchaser filed a bill for specific performance of a contract for sale, which was dismissed, and afterwards discovered certain deeds made between the vendor and a *third party*, treating the contract as valid; it was held that this new matter did not warrant the purchaser in filing a supplemental bill in the nature of a bill of review (*p*).

The new matter
must be both
relevant and
material.

Where the House of Lords, on appeal, reversed a decree in the Court below, and an application to the House of Lords for leave to file a supplemental bill in nature of a bill of review was remitted to the Court below, because it had been made to the Lords *originally*, and not *on appeal*, Lord Chancellor Manners said, "I must be satisfied that the new facts sought to be put in issue are such as will materially affect the grounds upon which the Lords' order was made. Even if I gave permission to file this bill, still, if brought to a hearing, I could not give relief on it. As I do not know the grounds on which the House of Lords decided, I do not see how the fact sought to be put in issue could be brought under Lord Hardwicke's rule in 1 Ves. sen. (*q*). I shall therefore refuse the application, and, upon the plaintiff's appeal, if the

(*n*) *Carlisle v. Globe*, 1659, 3 C. Rep. 94; Nels. 52; Freem. 148.

(*p*) *Ord v. Noel*, 1821, 6 Madd. 127.

(*o*) *Bennet v. Lee*, 1742, 2 Atk. 529.

(*q*) *Vide Portsmouth v. Effingham*, 1750, 1 Ves. sen. 430.

Conditions
of the Bill.

Whether the
new matter
may change the
issue or not.

House of Lords decides in his favour, the materiality of the newly discovered facts will be established (r)."

The cases seem to be contradictory as to whether the new matter introduced into the bills in question may be such as constitutes a new issue, or not. From some cases it would appear that the new matter *must* constitute a new issue. From others it would appear that the new matter may either constitute a new issue, or be further evidence of matter already in issue. Whilst others again seem to shew that the new matter can only be further evidence of matter already in issue, and must not constitute a new issue.

In Lord Bacon's first Ordinance (s) it is said "that there may be a review upon new matter which hath arisen in time after the decree, and not any new proof which might have been used when the decree was made; nevertheless, upon new proof that has come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded."

In an anonymous case in Freeman's Reports (t) it is said, that "where a matter of fact was particularly in issue before the former hearing, though you have *new proof* of that matter, upon that you shall never have a bill of review. But where a new fact is alleged, that was not at the former hearing, there it may be ground for a bill of review."

In *The Attorney Gen. v. Turner* (u) written evidence was allowed to be brought forward by bill of review to contradict the testimony of a witness in the suit.

In *Norris v. Le Neve* (x) Lord Hardwicke says, "The present application is for leave to bring in a bill in the nature of a bill of review; and this is said

(r) *Blake v. Foster*, 1824, 2 Moll. 357. (t) 1677, Freem. 31.

(s) Beames's Orders, p. 1. (u) 1742, Amb. 587.

(x) 1743, 2 Atk. 34.

to be founded upon new matter, not at all in issue in the former cause, or upon matter which was in issue, but discovered since the hearing of the cause. Upon these rules I do allow that bills of review have been granted; for though it has been said that these were varied by the orders that were made in the cause of *Montgomery v. Clark* (y), yet I see no alteration, and, therefore, the rules I shall judge by in the present case must be the ancient ones. Lord Bacon's rules have never been departed from since the making of them. By the established practice of the Court there are two sorts of bills of review; one founded on supposed error appearing in the decree itself, the other on new matter, which must arise after the decree, or upon new proof which could not have been used at the time of the decree passed."

In *Paterson v. Slaughter* (z), Lord Hardwicke says, "All the bills of review I recollect to have known, were of new matter to prove what was put in issue. Lord Effingham's case (a) was so. He claimed under an old entail; and though he afterwards made title under a different entail, yet the issue was as claiming under some old entail generally. In the present case it is not new matter to prove what was put in issue, but to prove a title that was not in issue; and, therefore, the defendant would not be entitled to a bill of review."

In *Young v. Keighly* (b), Lord Eldon says, "The ground of a bill of review is error apparent on the face of the decree, or new evidence of a fact materially pressing upon the decree, and discovered at least after publication in the cause. If the fact had been known before publication, though some contra-

(y) 1742, 2 Atk. 379. But apparently not reported as to the point now in discussion.

(a) 1750, 1 Ves. sen. 430.

(b) 1809, 16 Ves. 348, 350; and see *Willan v. Willan*, 1809, ib. 72.

(z) 1755, Amb. 292.

Conditions
of the Bill.

diction appears in the cases, there is no authority that new evidence would not be sufficient ground." Again : " As far as I can ascertain what the Court permits with regard to bills of review on facts newly discovered, the decision appears to have been on new evidence which, if produced in time, would have *supported the original case*; and this is not applicable where the original case does not admit the introduction of the evidence, as not being put in issue originally." The same opinion was also expressed by Lord Manners in the case of *Blake v. Foster* (c).

But from *Partridge v. Usborne* (d) it appears, that matter discovered after the decree, though not capable of being used as evidence of any thing which was previously in issue in the cause, but constituting an entirely new issue, may be the subject of a supplemental bill in the nature of a bill of review. In that case a purchaser, a defendant in a suit for specific performance of a contract for sale of an estate, by his answer insisted merely that a good title to the property could not be shewn; but did not mention any warranty given, or representations made, by the vendor; and on the Master reporting in favour of the title, a decree for specific performance was made. After the order for the reference the defendant found that the timber on the estate had been falsely estimated in a statement which he alleged had been warranted at the sale, but which warranty was denied by the other side; and leave was given to the defendant to file a supplemental bill in the nature of a bill of review, to have the same benefit of the alleged warranty as if he had insisted on it in his answer.

In Gilbert's *Forum Romanum* it is said that "in bills of review they can examine to nothing that was

(c) 1814, 2 B. & B. 457.

(d) 1828, 5 Russ. 195.

in the original cause, unless it be matter happening subsequent, which was not before in issue, or upon matter of record or writing not known before; for if the Court should give them leave to enter into proofs upon the same points that were in issue, that would be under the same mischief as the examination of witnesses after publication, and an inlet into manifest perjury (*e*).”

Conditions
of the Bill.

Lastly, the opinion of Lord Redesdale seems to be, that a bill of review will lie in either case, whether the new matter constitutes a new issue, or is merely further evidence of matter already in issue. “It has been questioned,” says His Lordship (*f*), “whether the discovery of new matter not in issue in the cause in which a decree has been made, could be the ground of a bill of review; and whether the new matter on which bills of review have been founded, has not always been new matter to be used as evidence to prove matter in issue, in some manner, in the original bill. A case, indeed, can rarely happen in which new matter discovered would not be, in some degree, evidence of matter in issue in the original cause, if the pleadings were properly framed. Thus, if after a decree founded on a revocable deed, a deed of revocation and new limitations were discovered, as it would be a necessary allegation of title under the revocable deed that it had not been revoked, the question of revocation would have been in issue in the original cause, if the pleadings had been properly framed. So if after a decree founded on a supposed title of a person claiming as heir, a settlement or will were discovered which destroyed or qualified that title, it would be a necessary allegation of the title of the person claiming as heir, that the ancestor died

(*e*) For. Rom. p. 186.

(*f*) Ld. Red. ed. 4, p. 85.

Conditions
of the Bill.

seised in fee simple and intestate. But if a case were to arise in which the new matter discovered could not be evidence of any matter in issue in the original cause, and yet clearly demonstrated error in the decree, it should seem that it might be used as ground for a bill of review, if relief could not otherwise be obtained. It is scarcely possible, however, that such a case should arise, which might not be deemed, in some degree, a case of fraud, and the decree impeachable on that ground. In the case where the doubt before mentioned appears to have been stated, the new matter discovered and alleged as ground for a bill of review was a purchase for valuable consideration without notice of the plaintiff's title. This could only be used as a defence; and it seems to have been thought, that although it might have been proper under the circumstances, if the new matter had been discovered before the decree, to have allowed the defendant to amend his answer and put it in issue, yet it could not be made the subject of a bill of review, because it created no title paramount to the title of the plaintiff, but merely a ground to induce a Court of Equity not to interfere. And where a settlement had been made on a marriage in pursuance of articles, and the settlement, following the words of the articles, had made the husband tenant for life, with remainder to the heirs male of his body, and the husband, claiming as tenant in tail under the settlement, had levied a fine and devised to trustees, principally for the benefit of his son, and the trustees had obtained a decree to carry the trusts of the will into execution against the son, the son afterwards, on discovery of the articles, brought a bill to have the settlement rectified according to the articles, and a decree was made accordingly. In this case the

new matter does not appear to have been evidence of matter in issue in the first cause, but created a title adverse to that on which the first decree was made (g)."

Conditions
of the Bill.

In the next place, the new matter must have first come to the knowledge of the party after the time when it could have been used in the cause at the original hearing. Lord Bacon's Ordinance says, *after the decree*; "but," says Mr. Justice Story (h), "that seems corrected by the subsequent words, *and could not possibly have been used at the time when the decree passed*; which words point to the period of the publication of the testimony. And accordingly it is now the established exposition of the Ordinance that the new matter shall not have been discovered until after publication has passed (i)."

The new matter must have been unknown before publication.

It must also be shewn that due diligence was used in seeking for the new means of defence, at the time when it might have been used as a defence (k). "Upon a supplemental bill in nature of a bill of review," says Lord Eldon (l), "the question always is, not what the plaintiff knew, but what, by using reasonable diligence, he might have known." Thus, where a vicar brought a bill for tithes, and the defendant insisted on non-payment of tithes for wool and lambs, and a decree was nevertheless made for an account of small tithes, including those articles, and the defendant appealed, and afterwards presented a petition representing that the tithe of wool and lambs was of right payable to the impropriate rector, and was covered by an

Due diligence.

(g) *Roberts v. Kingsly*, 1749, 1 Ves. sen. 238.

(h) Eq. Pl. 327.

(i) Lord Hardwicke is reported to have said that the words of Lord Bacon were dark; but that the construction has been that the new matter must have come to the

knowledge of the party after publication passed. Amb. 293; 3 Atk. 34; *vide etiam* *Ord v. Noel*, 1821, 6 Madd. 127.

(k) *Barrington v. O'Brien*, 1812 2 Ball & B. 142.

(l) *Young v. Keighly*, 1810, 16 Ves. 353.

Conditions
of the Bill.

ancient composition, and that the evidence of these tithes belonging to the rectory consisted of a grant from the Crown under James the First, and of certain records in the Augmentation Office, only recently known to the defendant, and praying leave to file a supplemental bill in the nature of a bill of review to introduce the new evidence at the hearing of the appeal, Lord Eldon said, "If circumstances of this kind are to form grounds of bills of review, these applications will be constant and eternal. If the Augmentation Office had been searched at first, there would have been a proper defence. If it is to be laid down that a party may go on to a decree without looking for a defence, and may then make applications of this kind, there will never be an end to them. It is not a case of a search made, and a miscarriage in that search, but it does not appear that there was any search at all (m)."

So leave was refused where the evidence since discovered, consisted of a deed and of proceedings in a suit, to which the defendant, the applicant, had been a party (n).

Confession
after decree.

It has been said that a *confession* by the plaintiff after decree, will not warrant a bill of review by the defendant (o).

Decree obtained by
fraud.

It has also been said that, if the new matter to be brought forward by the aggrieved party was known to the opposite party at the time of the decree, then, in order to warrant a bill of review, the new matter must be such as the party knowing it was not in conscience obliged to discover to the Court. For if it is such as he ought in conscience to have discovered to

(m) *Bingham v. Dawson*, 1821, *Macartney*, 1719, 2 Bro. P. C. 67. Jacob, 243.

(o) *Curtis v. Smallridge*, 1663, Freem. 178; 1 C. C. 43; 1 E. Ca. & B. 457; *vide etiam Ludlow v. Ab.* 377.

the Court, then the decree has been obtained by fraud, and ought to be set aside by *original* bill (*p*).

Conditions
of the Bill.

By the third of Lord Bacon's Ordinances it is declared that "no bill of review, or any other new bill, shall be admitted to change matter decreed, except the decree be first obeyed and performed; as if it be for land, that the possession is yielded; if it be for money, that the money be paid (*q*); if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone (*r*)."

But by the fourth Ordinance it is declared that "if any act be decreed to be done which extinguisheth the party's right at common law, as making of assurance or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like, those points of the decree are to be spared until the bill of review be determined, but such sparing is to be warranted by public order made in Court (*s*)."

The decree
must be first
performed.

Exceptions.

So, also, a party may obtain leave to file a supplemental bill in the nature of a bill of review, and may file the bill, even though he has not performed the decree in the original suit, if the proceedings under the decree are not at the time in such a state as to enable the adverse party to bring him into default for not having performed the decree. Thus in *Partridge v. Usborne* (*t*) above referred to, it was held, that after the defendant had obtained leave to file his supplemental bill in the nature of a bill of review, he had a

(*p*) *Manaton v. Molesworth*, 1757, 1 Eden, 18.

(*q*) *Vide Bp. of Durham v. Liddell*, 1717, 2 Bro. P. C. 63. Even this seems to have been dispensed with, where it appeared that the party was unable to pay the money, *Fitton v. Macclesfield*, 1684, 1 Vern. 264; Freem. 88; or to perform the decree, *Williams*

v. Mellish, 1682, 1 Vern. 117. And so where the defendant gave good security for payment, *Savil v. Darcy*, 1662, 1 C. C. 42; Freem. 172; 1 E. Ca. Ab. 82.

(*r*) Beames's Orders, 3; *Fitton v. Macclesfield*, 1684, Freem. 88; *Anon.* 1699, 12 Mod. 343.

(*s*) Beames's Orders, 4.

(*t*) 1828, 5 Russ. 195.

Conditions
of the Bill.

right to file it without having previously paid the purchase money which the decree commanded him to pay, because the time had not arrived at which the adverse party, in due execution of the decree, could compel payment.

It appears, however, that as soon as that time arrives, he will not be allowed to *proceed* with his bill until he pays the purchase money to the vendor; and that such payment will not be dispensed with, nor will payment into Court be allowed in substitution, even though the sum be very large (*u*).

Party who has
not joined in
the petition
may sometimes
have the
benefit.

Sometimes a party who has not joined in the petition for rehearing, may have the benefit of it. Thus in *Hill v. Chapman* (*x*), after a decree had been made establishing a will, a legatee coming into *esse* after the death of the testator, joined himself to the suit by a supplemental suit; and on a rehearing, on the petition of the other parties, in order to rectify an error in the decree, the new party was allowed to raise an objection to the decree.

Decree must be
impeached in
the Court in
which it was
made.

A decree must be impeached in the same Court as that in which it was pronounced, and not by an original bill in another Court. Thus where, in a suit by executors in the Court of Exchequer, an account was taken under a decree, and the next of kin and heir at law filed an original bill in Chancery impeaching the account on discovery of new evidence, shewing that assets to a greater amount than they had stated had come to the executors' hands before the suit, and also further assets since the suit; it was held that the original bill was irregular, and that the object of the original bill ought to have been sought by a review, in the Court of Exchequer, of the decree pronounced there (*y*).

(*u*) Ibid.

(*x*) 1791, 1 Ves. jun. 405.

(*y*) *Dolan v. Nevill*, 1826, 2 Moll. 494.

“ There is another important qualification,” says Mr. Justice Story (z), “ which is indeed deducible from the very language of Lord Bacon’s Ordinance ; and that is, that the granting of such a bill of review for newly discovered evidence is not a matter of right, but rests in the sound discretion of the Court. It may, therefore, be refused, although the facts, if admitted, would change the decree, where the Court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable (a).”

Conditions
of the Bill.

Leave to bring
the bill is dis-
cretionary.

A bill of review upon newly discovered matter has been permitted even after an affirmation of the decree in the House of Lords. Thus where a decree had been made dismissing a bill, and that dismissal had been affirmed by the House of Lords on appeal, and afterwards a bill of review was brought for discovery of a deed said to have been burnt pending the appeal, which made out the plaintiff’s title ; and the bill was filed in order that after such discovery the plaintiff might apply to the House of Lords for relief, the defendant on demurrer was ordered to answer (b). And a bill of review may be brought after one bill of review already filed, as if upon a bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal (c). But if a demurrer has been allowed to a bill of review, a new bill of review upon the same ground will not be allowed (d).

Bill of review
after affirma-
tion of decree
in the House
of Lords.

Review of a
review is good.

As to the time within which these bills must be filed, we learn that a bill of review for *error apparent*

Limitation of
time for bring-
ing the review.

(z) Eq. Pl. p. 332.

(c) Ld. Red. ed. 4, p. 88.

(a) *Bennet v. Lee*, 1742, 2 Atk. 528 ; *Wilson v. Webb*, 1788, 2 Cox, 3.

(d) Ld. Red. ed. 4, p. 88 ; *Dun-ny v. Filmore*, 1682, 1 Vern. 135 ; *Pitt v. Arglass*, 1686, 1 Vern.

(b) *Barbon v. Searle*, 1685, 1 Vern. 416.

Conditions
of the Bill.

must be brought within the same period as that which limits writs of error at law; and, says Mr. Justice Story (*e*), “the question may arise whether the like limitation applies to bills of review upon newly discovered facts and evidence. There can be no doubt that it would be a good bar, that the bill of review was not brought within the period limited for writs of error after the *discovery of the new facts or evidence*; but the question is, whether a bill of review will lie after the lapse of that period from the time of *making the decree*, although it be within the prescribed period after the discovery of the new facts or evidence. There does not seem to be any decision settling the point; and as the allowance of a bill of review for newly discovered evidence is discretionary with the Court, it is scarcely probable that it will arise in judgment, as the lapse of time will always have great weight with the Court in refusing the application, in connexion with the other circumstances.”

In *Lytton v. Lytton* (*f*), however, it is decided that though a bill of review cannot in general be brought to reverse a decree after twenty years, yet that bar does not apply to persons having contingent interests, and then not existing, or under disabilities.

Form
of the Bill.

States former
proceedings.

The supplemental bill in the nature of a bill of review must state the former bill, and the proceedings thereon. It must, of course, also set out the decree, and shew the point in which the party exhibiting the bill conceives himself aggrieved by the decree. It must also state positively whether the decree has been enrolled or not; for it will not be regular to state this in the alternative, praying one sort of relief, as upon

(*e*) Eq. Pl. 333.

(*f*) 1793, 4 Bro. C. C. 441.
And see *Edwards v. Carroll*, 1760,
2 Bro. P. C. 98; *Fitton v. Maccles-*

field, 1684, 1 Vern. 287; *Sherring-*
ton v. Smith, 1704, 2 Bro. P. C.
62. These, however, are cases of
bills of review on *error apparent*.

a bill of review, if the decree has been enrolled, and, if not enrolled, then to have the benefit of it as a supplemental bill in the nature of a bill of review. "There is this difference," says Lord Eldon in a case (*g*) in which it was not stated whether the decree was enrolled or not, "between a bill of review, and a supplemental bill in the nature of a bill of review :—in the former, if introducing also matter of supplement or revivor, the prayer, as far as it is a bill of review, is that the decree may be reviewed and reversed :—in the other, adopting also the proper prayer for revivor, as to the supplemental matter you pray that the cause may be reheard. In that respect I doubt whether this is an accurate record in not stating positively the fact whether the decree is enrolled or not."

Form
of the Bill.

The bill must then proceed to state the new matter on which the decree is sought to be impeached : it is not necessary, however, to point out the effects of it, for it is the province of the Court to make the inference of law from the new matter (*h*). It seems necessary also to state the fact of the discovery, though "it has been doubted," says Lord Redesdale (*i*), "whether after leave has been given to file the bill, the fact of the discovery is traversable. But," he adds, "this doubt may be questioned if the defendant to the bill of review (*k*) can offer evidence that the matter alleged in the new bill was within the knowledge of the party, who might have taken the benefit of it in the original cause (*l*). It seems also necessary to state that leave

States the
supplemental
matter.

States the
discovery.

States the

(*g*) *Perry v. Phelps*, 1810, 17 Ves. 176.

(*h*) *Norris v. Le Nere*, 1743, 3 Atk. 36.

(*i*) Ed. 4, p. 89.

(*k*) It is apprehended that the same rules apply to supplemental bills in the nature of bills of review, as to bills of review themselves.

(*l*) If the fact of discovery is in issue in the cause, it ought to be proved to entitle the plaintiff to demand the judgment of the Court on the matter alleged, as ground for reviewing the decree ; and it may consequently be disproved by evidence on the part of the defendant. *Vide* Ld. Red. ed. 4, p. 89.

Form
of the Bill.
leave of the
Court.

has been obtained to file the bill; and if an order has been made dispensing with the payment of costs, which ought to precede that event, such order must be set out in the bill (*m*).

Prayer.

The bill merely prays, as we have before said, that the cause may be heard with respect to the new matter at the same time as it is reheard upon the original bill, and for such relief as the nature of the case made by the supplemental matter requires (*n*).

May be joined
with bills of
revivor or
supplement.

These bills may also, if the original suit has become abated, have bills of revivor incorporated with them, or introduce new parties, if necessary, by way of supplement (*o*). But if the bill, so far as it is a supplemental bill in nature of a bill of review, is ordered to be taken off the file for any irregularity, the bill of revivor incorporated with it will share its fate, and be taken off the file also (*p*).

Parties.

As to the parties, it appears that all the parties to the original bill ought to be made parties to the bill of review; "for it is a principle of natural justice that no one ought to be affected by any decree without his first being heard (*q*)."

Subsequent
Proceedings.

The rules as to the defence and evidence in the supplemental suit will, in general, be the same as those already given with respect to the bills considered in the second chapter of this treatise; and the supplemental suit will be set down to be heard at the same time as the original suit comes on to be reheard.

(*m*) *Fitton v. Macclesfield*, 1684, 1 Vern. 292. v. *Phelips*, 1810, 17 Ves. 173, 176.

(*p*) *Hodson v. Ball*, 1841, 11

(*n*) For a precedent of this sort of bill, see the Appendix, No. VIII.

Sim. 456.

(*o*) Ld. Red. ed. 4, p. 89; *Price v. Keyte*, 1682, 1 Vern. 135; *Perry*

(*q*) *Hartwell v. Townsend*, 1768, 2 Bro. P. C. 107.

CHAPTER IV.

OF IMPERFECTIONS SUBSEQUENT TO THE INSTITUTION OF THE SUIT.

A SUIT, perfect in its institution, may become imperfect after the filing of the original bill, from some event arising, which, either wholly or partly, hinders the further prosecution thereof. The various sorts of Imperfections subsequent.

The Court, as we before observed, will not permit any event which has arisen subsequently to the filing of the original bill, to be introduced into the original bill by way of amendment (*a*), except in some few instances. But it allows the imperfection to be remedied by other means;—in some cases by filing a new bill referring to the original bill, and bringing the new event before the Court;—in other cases by giving to a new suit the benefit of the proceedings in the original suit.

The event which arises subsequently to the filing of the original bill, may be either such an event as makes a change in the parties representing the interest in the matter in litigation; or it may be such an event as makes no change in the parties representing the interest, but merely demands the introduction of new matter into the suit.

We will begin with the most common sort of imperfection; that occasioned by an event which, occurring in the middle of a suit, disturbs the interests which have before been properly represented, and renders the suit imperfect for want of parties. Where the event causes a change in the parties.

(*a*) *Brown v. Hyden*, 1736, 1 Atk. 291.

The various
sorts of Imper-
fections sub-
sequent.

To understand this properly, it will be necessary to bear in mind the fundamental rule of a Court of Equity, that every interest in the subject matter of a suit which may be affected by the relief prayed, must be represented in the suit. There may be numerous interests arising out of one property. The subject matter of a suit may be a single acre of land, but there may be interested in this acre a tenant for life, several remaindermen, a lessee, a mortgagee, a purchaser, trustees, and various others; some or all of whom may be affected by the decree sought. Now all these interests must be properly represented, not merely at the commencement of the suit, but throughout the whole course of it; if, therefore, any one of them is no longer properly represented, it must be either that something has happened affecting the person who represented it, or that something has happened affecting the interest itself. In other words,—on the one hand, a party may arrive at the termination of his existence, either natural or civil, and so lose his capacity of sustaining his share of the suit; or, on the other hand, while all the parties retain their existence, and their capacity of suing, or being sued, yet from their ceasing to represent among them all the interests in the matter in litigation, the suit may be incapable of being brought to a final and complete termination.

Civil death of
a party.

Again,—where a party to the suit comes to a natural or civil termination of his existence, so as to be, as we have said, no longer capable of sustaining his part therein, the consequences of this event will be different according as the interest of the deceased party in the subject matter of the suit survives his death, as in the case of the death of a tenant in fee, or dies with him, as in the case of a tenant for life, a rector, or a bishop. In the former case the suit is only discon-

Where the in-

tinued as to such party, and is said to be *abated*, or to suffer an *abatement*, which abatement may, as we shall see, be remedied by the corresponding process of *revivor*; whilst, in the latter case, the suit is completely at an end with respect to the party deceased; and the proceedings which have been had in it, by or against such party, cannot be made use of by or against any other party obtaining possession of the same property, except by the indulgence of the Court, and under certain conditions and restrictions.

The various sorts of Imperfections subsequent.

Interest survives the death.

Where the interest dies with the party.

On the other hand, an imperfection occurring in the course of the suit, such as causes the parties to it, without losing their existence, to cease to represent among them all the interests in the matter in litigation, may arise, first, from the assignment of an interest by one person to another, as in the case of a sale, a mortgage, or a bankruptcy; or, secondly, from the rise of a new interest, as in the case of the birth of a child entitled under a settlement; or, thirdly, from the cessation of an interest during the lifetime of the party enjoying it, as in the case of a tenant until a contingency losing his interest upon the occurrence of the contingency.

Changes of interest *inter vivos*.

Lastly, when the new event makes no change in the parties to the suit, there is no subdivision of the subject.

When the event does not alter the parties.

It is proposed, then, first to consider the subjects of Abatement and Revivor, with the consequences which they produce upon the proceedings in the suit; and, secondly, to discuss the circumstances under which a party may die without leaving any interest surviving him, and to inquire how far the benefit of the proceedings respecting such party may be made available in a new suit.

Division of the Subject.

After this, we will consider the three several cases

Division of
the Subject.

of Assignment of interest, Rise of a new interest, and Cessation of interest during life; and, lastly, there will remain the subject of those events which, while they render the suit imperfect, make no change necessary in the parties to it.

It is hardly necessary to premise, that in speaking of *interests* it is intended to include, not beneficial interests only, but *liabilities*, which are, as it were, negative interests in the matter. Thus the connexion which a trustee, sued for a breach of trust, has with the suit, may be as well expressed by the term *interest*, as that of the *cestuis que trust* who sue him.

CHAPTER V.

OF ABATEMENT.

WE have seen that where the event which renders an interest which survives that event no longer represented in the suit, is such as terminates the legal existence of the representative, the suit is said to abate, or be abated, as to that party. This abatement will affect the suit in one of two ways.—If the party was sole plaintiff or sole defendant, the abatement as to him is an abatement of the whole suit.—If he was one of several plaintiffs or several defendants, the suit remains unabated as to the other parties (*a*), but it is rendered defective as to them, because there is a material interest unrepresented.

Nature
of Abatement.

Total or partial.

There is, however, one anomalous species of cases, in which one of several plaintiffs may die, and leave an interest surviving him, and yet the suit may not only not abate, but not even become defective. This occurs in the description of cases in which it is permitted to one or more persons *belonging to a class*, as creditors, next of kin, &c. to file a bill on behalf of themselves and the rest of the class. In such a suit as this, if there are more than one plaintiff on the record, and a plaintiff dies or otherwise loses his legal existence, the suit is wholly unaffected, although he leaves an interest surviving him which devolves on his representatives. For as one plaintiff would have

Cannot occur in a creditors' suit, where there are more than one plaintiff.

(*a*) *Finch v. Winchelsea*, 1727, “the death of one plaintiff, the suit
1 E. Ca. Ab. 2; *vide etiam*, 11 Ves. not abating as to the other.”
312, where Lord Eldon speaks of

Nature
of Abatement.

been originally sufficient to sustain the suit on behalf of all, so one plaintiff is now sufficient to continue it (*b*), and the representatives of the deceased plaintiff are in no worse condition than the other persons of the same class who were never put on the record at all.

Unless they
sue in respect
of their several
demands,

Where, however, some creditors join in filing a bill in respect of their *several demands* under a composition deed, and not on behalf of all the creditors, of course the death of one of them causes an abatement, as in the case of any other co-plaintiff dying (*c*).

or in different
capacities.

And if the other co-plaintiffs are not creditors in the same *capacity* as the deceased co-plaintiff, then they can only prosecute the suit so far as their interest is concerned, and therefore the suit abates as to the deceased co-plaintiff as much as in any other case of a co-plaintiff dying. Thus where a bill was filed by Burney, a judgment creditor, on behalf of himself and all other judgment creditors, together with Morgan, a mortgagee, as co-plaintiff; and after decree Burney died, his death was, in effect, held to cause an abatement as to him. For though Sir John Leach, V. C., said that Burney's death did not abate the suit, because Morgan might have prosecuted the decree, yet as His Honor allowed a revivor by Burney's representatives to be good, it is clear that he only meant that the suit was not abated, so far as Burney's and Morgan's interests were identical (*d*).

What Events
cause Abate-
ment.

We will now consider what events will cause an abatement of a suit; that is, what events will cause the civil death of a party, and at the same time leave his interest surviving him. For this purpose we must

(*b*) *Leigh v. Thomas*, 1751, 2 Ves. sen. 364.

(*c*) *Boddy v. Kent*, 1816, 1 Mer.

(*d*) *Burney v. Morgan*, 1823, 1 S. & S. 358.

first inquire, generally, what are the events by which the civil existence of a party is terminated.

A civil dissolution might formerly have been the result of taking monastic orders, and of excommunication or conviction of popish recusancy; but now by Act of Parliament (e) it is directed that in those cases in which excommunication is to continue, no person pronounced or declared excommunicate shall incur any civil penalty or incapacity whatever, save such imprisonment as the Court is thereby authorised to inflict; and the disqualification arising from popish recusancy has been virtually, if not actually, abolished by another Act of Parliament (f), by which papists and persons professing the popish religion, taking the oaths and subscribing the declarations therein mentioned, were relieved from most of the penalties and disabilities to which they were then subject; whilst the incapacity from taking monastic orders has long ceased to exist at all.

What Events
cause Abate-
ment.

Excommuni-
cation and popish
recusancy no
longer cause a
civil death.

The events which at the present day may cause a civil death during the course of a suit, are, Death, Marriage of a female, Outlawry, Attainder, and, in the case of an alien, the commencement of a War.

First, as to Death. As a suit cannot be instituted by Death, or against a dead man, so neither can it, when commenced by or against a living individual, be prosecuted by or against him after his death. At the moment of his death, therefore, if his interest survives him, the suit, as regards him, is abated.

Secondly, as to the Marriage of a female. In consequence of a *feme covert*'s incapacity to sue or be sued, a woman's marriage amounts to a civil death; and as her interest survives her, and goes over to her husband, her marriage ought to cause an abatement of

Marriage of a
female.

(e) 53 G. 3, c. 127, s. 3.

(f) 31 G. 3, c. 32.

What Events
cause Abate-
ment.

the suit. But here a remarkable distinction presents itself. If the woman be a plaintiff, the consequences of her civil death are carried out, and the suit is abated as far as she is concerned; but if she be a defendant, no abatement is caused by her marriage (*g*); her husband is, without any formality, substituted in her place, and the plaintiff may continue his suit as before, by merely naming him, together with his wife, in the subsequent proceedings (*h*).

The cause of this distinction has been given as follows:—"The reason of the difference between the cases of a female plaintiff and a female defendant, seems to be, that a plaintiff seeking to obtain a right, the defendant may be injured by answering to one who is not entitled to sue for it; but a defendant merely justifying a possession, the plaintiff cannot be injured by a decree against the person holding that possession (*i*)."

We should here remark that if a female plaintiff marries, thereby causing an abatement, and the husband dies before any further step has been taken in the suit, the abatement will cease of itself, her incapacity being removed. But the subsequent proceedings ought to be in the name and with the description which she has acquired by her marriage (*k*).

Outlawry.

Thirdly, as to Outlawry. The situation of an outlaw is somewhat changed from what it formerly was. An outlaw was once strictly what the name implies, a man beyond the province of the law;—who could not sue because the law afforded him no protection; whom it was useless to sue because you might take from him all that he had, and even put him to death without the intervention of any law. It is clear therefore

(*g*) *Jackson v. Smith*, 1577, Cary, by Lambert, 81; *Abergavenny v. Abergavenny*, 1731, 2 E. Ca. Ab. 1.

(*h*) 1 Ves. sen. 182.

(*i*) Ld. Red. ed. 4, p. 58, n.

(*k*) *Godwin v. Ferrars*, 1772, cited in Ld. Red. ed. 4, p. 60, n.

that an outlaw was originally a man *civiliter mortuus*, and it followed that if a party to a suit became outlawed, the suit immediately ceased as far as he was concerned. What Events
cause Abate-
ment.

The rigour of the law against outlaws has for many years past been considerably abated, and such persons are now far from being without the pale of the law. It is still true, however, that (with the exception of executors and administrators (*l*), or the husbands of the same (*m*), next friends (*n*), and other persons suing *in autre droit*, except relators in informations (*o*),) they cannot sue in a Court of Justice while the outlawry is in force (*p*), except for the purpose of reversing the outlawry; nor can they be made defendants to a suit where the demand is *in rem* and they are made defendants as being interested therein (*q*); it appears, however, that they may be sued for a demand against themselves personally, and cannot plead their own outlawry (*r*). It can hardly be said, however, where the demand is *in rem*, that the outlaw's interest survives his outlawry, although it may return to him on a reversal of it. It is apprehended therefore that outlawry falling upon a *plaintiff*, not clothed with one of the characters above excepted, will cause, not so much an abatement as a suspension of the suit as far as he is concerned (*s*); and that outlawry falling

(*l*) *Killigrew v. Killigrew*, 1683, 1 Vern. 184.

(*m*) 1 Dan. Ch. Pr. 59.

(*n*) Prac. Reg. 350.

(*o*) 3 Bac. Abr. 762.

(*p*) 1 Dan. Ch. Pr. 59.

(*q*) 1 Dan. Ch. Pr. 256.

(*r*) 1 Dan. Ch. Pr. 256.

(*s*) It seems to be undecided what, if any, step must be taken by a plaintiff on the reversal of an outlawry which has fallen upon him

during the suit. Where the plaintiff is an outlaw *at the institution* of the suit, Mr. Daniell inclines to the opinion of Lord Chief Baron Gilbert, that a bill of revivor ought to be filed on the reversal of the outlawry, because the plea of the outlawry is a part of the record. [1 Dan. Ch. Pr. 63.] But this argument will not apply where the plaintiff becomes outlawed *after the institution* of the suit.

What Events
cause Abate-
ment.

on a *defendant* will not cause even a suspension of the suit as to him, where he has been made a party in respect of a personal demand and not in respect of a demand *in rem*.

Attainder.

Fourthly:—A person attainted for treason or felony is incapable of maintaining any suit, being considered as already dead (*t*); but, as in the case of outlawry, it seems that he may be sued for a personal demand against himself, and cannot plead his own attainder, though he cannot be a defendant merely as being interested in a demand *in rem* (*u*). It is apprehended therefore that a suit would not abate, but entirely cease, as to a *plaintiff* who became attainted, although it might not cease as to a *defendant* who became attainted, if he had been made a defendant in respect of a personal demand only.

Alien.

Fifthly:—An alien enemy cannot sue in this country, although doubtless he may be sued for a demand against himself. His interest however, like the outlaw's, cannot strictly be said to survive him. If therefore a war should break out pending a suit in which an alien is concerned, who thereby becomes an alien enemy, it is apprehended that the suit would be suspended only, and not abated, as to such alien, if he were a *plaintiff*, and not even suspended, if he were a *defendant*, unless made a defendant merely as being interested in a demand *in rem*. On the restoration of peace, his right to sue is restored (*x*).

Bankruptcy
and insolvency,
do not cause
abatement.

It might at first sight appear that Bankruptcy and Insolvency, also, were causes of abatement; but on further consideration it will be observed that those events deprive a man of his *property* only, and not of his *civil existence*. He is still personally capable of

(*t*) 1 Dan. Ch. Pr. 63.

(*u*) Ibid. 256.

(*x*) 1 Dan. Ch. Pr. 56.

suing and being sued, though his destitution of property limits his opportunities of standing in either of those conditions. Accordingly, although the language of some of the earlier cases seems to represent Bankruptcy and Insolvency as causing abatement, yet expressions occur in other cases of the same period, and in later ones, treating those events as occasioning *defect* only.

What Events
cause Abate-
ment.

Thus in *Child v. Frederick* (*y*) it is said that the assignees of a bankrupt plaintiff continue the suit by original bill in the nature of a *bill of revivor*, which implies that bankruptcy is an abatement; but in an anonymous case in *Atkyns* (*z*), Lord Hardwicke says expressly that bankruptcy is no abatement.

Again, in *Davidson v. Butler* (*a*), the Court of Exchequer held that it was the clear established custom of that Court not to consider bankruptcy as causing an abatement. They refer to a case of *Sellers v. Dawson* (*b*) as affording an argument the other way, but overrule it as not having been fully argued on authorities.

When, however, that case is looked to, the result of it appears to be opposed to the doctrine of treating bankruptcy as an abatement. It is true that Lord Thurlow said expressly that he considered bankruptcy to be an abatement, but then he adds, that the assignees of a bankrupt plaintiff continue the suit by original bill in the nature of a *supplemental bill*, and that there must be a decree in the supplemental suit itself;—that the original suit was gone by the bankruptcy, and that the new suit by the assignees might take the benefit of the former suit. This language

(*y*) 1714, 1 P. W. 266.

263, n.

(*z*) Anon. 1748, 1 Atk. 263.

(*b*) Chy. 1790; cited 1 Atk.

(*a*) Excheq. 1793; cited 1 Atk. 263, n.

What Events
cause Abate-
ment.

would seem to contradict the former assertion, and to shew that his Lordship considered bankruptcy as causing *defect* and *not abatement*, otherwise he would have pointed out a bill in the nature of a *bill of revivor* as the proper remedy.

In the course of an argument (c) it was laid down decidedly by the late Mr. Jacob, that bankruptcy is no abatement; and the same opinion seems to be entertained by Lord Langdale, M. R., from the following words which fell from his Lordship;—"having regard to the analogous cases of *defect* by bankruptcy and *abatement* by marriage, &c. (d)."

Lastly, Sir James Wigram, V. C., has said expressly that "bankruptcy, according to the practice in Chancery, renders a suit defective, but does not cause an abatement (e)."

Effects
of Abatement.

Let us now consider the effects of abatement on the proceedings in a suit.—As a general rule an abatement has the effect of suspending all proceedings in a suit, existing at the time of its occurrence, and also of incapacitating any party from taking any further proceeding in it.

I. On existing
proceedings.
Order to dis-
miss bill.

Thus any order obtained previously to the abatement loses its power upon the abatement occurring, and continues suspended as long as the abatement lasts. Where, therefore, a motion was made by a defendant to dismiss a bill for want of prosecution, and the plaintiff appeared and undertook to set down the cause for hearing in a limited time, and in default the bill was to stand dismissed, and then the defendant died, and the time for setting down the cause expired before the suit could be revived, it was held that the

(c) 1827, 1 Sim. 502.

(d) 1810, 3 Beav. 294.

(e) 1842, 1 Hare, 617.

order dismissing the bill was suspended during the abatement (*f*).

Effects
of Abatement.

Process of contempt, sequestrations, receiverships appointed upon process, subpoenas to hear judgment, injunctions, and other proceedings existing at the time of the abatement, will abate with the suit. This at least is always their *natural* fate (*g*). But in some cases, namely where a revivor of the suit would have the effect of reviving those proceedings, we shall see that the Court will interpose its power, and keep the proceedings alive for a short time, in order to give an opportunity of reviving them with the revivor of the suit (*h*).

Process, injunctions, &c.

There is, however, an exception to this rule in the case of a *perpetual* injunction having been obtained before the abatement. Such an injunction will continue in force notwithstanding the abatement (*i*).

A perpetual injunction does not abate.

Again, with respect to further proceedings;—no order can be obtained during an abatement (*k*); and where an order to dismiss the bill for want of prosecution was obtained during an abatement, it was held irregular (*l*). However, the order, if obtained, will not be considered as a mere nullity, and accordingly in the above case of *Boddy v. Kent*, where such an order had been obtained during an abatement by the death of a co-plaintiff, Lord Eldon said that the order to revive could not be obtained until the order to dismiss, though an irregular order, had been discharged. His Lordship also said that the above case of *Sellers*

II. On further proceedings.
Order in the cause.

(*f*) *Gregson v. Oswald*, 1787, Dick. 351; *Askew v. Townsend*, 1 Cox, 343. 1772, *ibid.* 471.

(*g*) 1 Hare, 622. See *vide Horwood v. Schmedes*, 1806, 12 Ves. 311; and *Askew v. Townsend*, 1772, Dick. 471.

(*h*) *Post*, Chapter IX.

(*i*) *Yeomans v. Kilrington*, 1762, 361.

(*k*) *Sellers v. Dawson*, 1790, cited 1 Atk. 263. This case was decided on the supposition that bankruptcy was an abatement.

(*l*) *Boddy v. Kent*, 1816, 1 Mer.

Effects
of Abatement.

v. *Dawson* did not warrant the view that the irregular order was a mere nullity.

Mr. Daniell (*m*) strongly questions the above decision in *Boddy v. Kent*, observing that as an abatement is total whether it occurs by the death of a sole plaintiff or a co-plaintiff, and as, therefore, there is no person in existence who can oppose the motion to dismiss, nor, until the suit has been revived, any person who can move for the discharge of the order to dismiss, it is difficult to conceive what else could have been done than to act as if the order to dismiss had not been obtained. With deference, however, it appears that he is wrong in supposing that an abatement by the death of a co-plaintiff is a total abatement (*n*), although it may for some purposes have the same effect as a total abatement; and even if it were, there is nothing to warrant the assertion that the suit must be revived before any person can be in existence who can move for the discharge of the order to dismiss. The same power which, during an abatement, can preserve the existence of an irregular order, can also, during the same abatement, give existence to an order to discharge such irregular order.

Process of
contempt.

Process of contempt, issued during a total abatement, is irregular, and may be discharged on motion with costs. And if a defendant is arrested on any process during an abatement, he will be discharged with costs to be paid by the arresting party (*o*).

Where a co-plaintiff died, and it being doubtful what interest his executors had in the matters in litigation, and they shewing no disposition to become co-plaintiffs in any bill of revivor, none was filed; and the

(*m*) 2 Dan. Ch. Pr. 360.

(*n*) *Vide* 11 Ves. 312; where one plaintiff, the suit not abating as to the other."

Lord Eldon speaks of "the death of

(*o*) 3 Dan. Ch. Pr. 223.

surviving plaintiffs proceeded to issue an attachment against one of the defendants for some default; upon a motion calling in question the regularity of such attachment, Sir John Leach, V.C., said, “that the surviving plaintiffs ought to be prepared to shew that the representatives of the deceased plaintiff had no interest in the suit; because, if they had any interest, the issuing of an attachment in the absence of persons whose rights that process of contempt was in part meant to enforce, was at variance with the practice of the Court; and that he could not imagine any case in which the issuing of an attachment pending an abatement could be justified, unless, perhaps, when the rights of parties had been declared, and it was a proceeding between those parties only, and strictly limited to the enforcement of their rights, and in which no one else but themselves had any concern (*p*).”

Effects
of Abatement.

Where a suit abated by the marriage of a female plaintiff, and, before it was revived, a cross bill was filed, it was held that the original bill had lost its priority over the cross bill (*q*).

Cross bill.

Depositions taken during an abatement cannot be used afterwards. Thus where a devisee of a plaintiff filed by mistake a simple bill of revivor, and examined witnesses, and the bill of revivor was dismissed as irregular, whereupon the devisee filed an original bill in the nature of a bill of revivor, he was not allowed to make use of the depositions taken under the bill of revivor, because they were taken when in fact there was no cause before the Court (*r*).

Depositions.

Where a suit abates after a decree has been pro-

Passing a
decree.

(*p*) *Gibbs v. Churton*, 1824, 1 260.
C. P. Cooper, 496.

(*r*) *Backhouse v. Middleton*,

(*q*) *Smart v. Floyer*, 1754, Dick. 1670, 1 C. C. 175; 3 Ch. R. 40.

Effects
of Abatement.

Irregular proceeding must be questioned at the time of its taking place.

nounced, the suit must be revived before the decree can be passed (s).

It appears, however, that if any proceeding takes place in a suit pending an abatement, and is not called in question at the time of its taking place, it cannot be called in question afterwards. Thus, where a *feme sole* filed a bill, and afterwards married, (thereby causing an abatement), and proceeded to a decree without having filed any bill of revivor, and afterwards a bill of review was filed impeaching the decree as having been made during an abatement, the bill of review was dismissed, "because the error was only matter of abatement, (*i. e.* matter of practice), and not to the right; and appeared not in the body of the decree, but was matter of fact out of the decree, and might have been taken advantage of at the hearing (t)."

Partial abatement.

Where the cause is abated as to one only of several defendants, it merely prevents proceedings from being taken by which the interest of such defendant can be affected, and proceedings affecting the other parties only may take place as before.

Thus where a decree had been made ordering certain trustees and their *cestui que trust* to make a conveyance of some property, and the *cestui que trust* died before the conveyance had been executed, the trustees were compelled to convey notwithstanding such partial abatement (u).

So, pending a partial abatement by the death of one defendant, process of contempt may be issued and executed against the other defendants (x).

(s) *Bertie v. Falkland*, 1715, v. *Vintner*, 1664, *ibid.* 252. Dick. 25.

(v) *Finch v. Winchelsea*, 1727,

(t) *Cramborne v. Dalnahoy*, 1 E. C. Ab. 2.

1662, 1 C. R. 231; and see *Peachy*

(x) 3 Dan. Ch. Pr. 225.

And where a bill was retained with liberty to the plaintiff to bring an action against one of the defendants, and there was no direction as to the other defendants attending the trial, and one of these other defendants died, and the action was tried before the suit was revived, it was held that the trial was not prejudiced thereby. But it was allowed that it would have been otherwise if the defendant who died had been directed to attend the trial (*y*).

Effects
of Abatement.

There are some exceptions to the rule that no proceedings can be had in a suit during an abatement (*z*). Thus where a sum of money had been ordered to be paid by one defendant to another defendant, and the plaintiff died before the money was paid, Sir L. Shadwell, V. C., held that as the proceeding was one in which it was plain no one had any interest except the defendants, it might without inconvenience go on notwithstanding the abatement, and that there was no occasion to wait until a bill of revivor should be filed (*a*).

Exceptions to
the rule.
Payment of
money out of
Court.

Sometimes money may be paid out of Court, even where no order precisely to that effect has been made previously to the abatement. Thus, where a decree had given an infant plaintiff liberty to apply, at twenty-one, to have certain stock and cash transferred and paid to him, and the plaintiff died after twenty-one, without having so applied, and his administrator petitioned for the transfer and payment to him of the stock and cash, Lord Eldon made the order, the right of the petitioner being clear (*b*).

These orders are of frequent occurrence, also, where,

(*y*) *Humphreys v. Hollis*, 1821, Jac. 73. *Exp. Armstrong*, 1790, 3 Bro. C. C. 238.

(*z*) In a case of lunacy, where a reference had been made to the Master, and then the lunatic died, it was said that the Master should make his report notwithstanding.

(*a*) *Jones v. Williams*, 1837, 1 C. P. Cooper, 488.

(*b*) *Roundell v. Currer*, 1801, 6 Ves. 250.

Effects
of Abatement.

by a decree or decretal order, the dividends of a fund in Court have been directed to be paid to a tenant for life, and liberty has been given to the parties interested, to apply for the fund at his death. The tenant for life probably survives some or all of the parties to the suit, so that when, on his death, the occasion for applying to the Court respecting the fund arises, the suit is, and perhaps has long been, abated. In such a case it is not necessary for the parties interested to revive the suit, but they may present a petition for transfer of the fund, on which, and by means of a reference to the Master, if necessary, their rights will be ascertained and determined.

If, however, by the decree or decretal order, further directions have been reserved, the hearing of the cause is not at an end, but it must be again set down for hearing. This cannot be done pending an abatement, and the suit must therefore be previously revived.

It is conceived that when a petition for the above purpose is presented in an abated suit, all persons who would have been made parties to a bill of revivor if such a course had been adopted, must be made parties to the petition, either by joining in it as petitioners, or by being served with it.

It has been said that the payment of the fund cannot be ordered, unless all parties interested give their consent to it. Thus where a suit for the administration of an estate abated by the marriage of a female co-plaintiff, an infant; and a petition was presented that the executors in the cause might raise money by sale or mortgage of a certain term, and pay it to the defendant with a view of putting an end to the suit, Lord Hardwicke said, that by consent of all parties money might be ordered to be paid out of Court

during an abatement, but not without such consent ; and that therefore in this case he could not, on motion or petition, order money to be raised out of the estate, because it was limited in remainder to the infant co-plaintiff in fee, who could not give her consent ; and that he could only do so by a decree at the hearing (c). Perhaps, however, the above case can hardly be considered to be exactly in point, the object being, not to *pay* money to a party *entitled* to it, but to *raise* money for a purpose entirely new.

Effects
of Abatement.

So an order may be made, pending an abatement, for the delivery up of deeds and writings brought into Court ; or a reference may be made to the Master for inquiry to whom they belong (d).

Delivery of
deeds and
writings.

Where great delay had occurred in the prosecution of a decree in a creditors' suit for the administration of assets, a creditor was allowed to apply, during an abatement caused by the death of the defendant, to have the conduct of the cause (e).

Conduct of the
cause.

An order may be obtained, during an abatement, to enrol a decree *nunc pro tunc*, and such enrolment may be made notwithstanding the abatement (f).

Enrolment of
decree.

And where any order, with the above exceptions, has been made and executed during an abatement, this being, as we have seen, irregular, a motion may be made pending the abatement, to discharge it (g).

Discharge of
irregular order.

Where a commission to examine witnesses abroad has issued before the abatement, depositions taken under it, during the abatement, will be good, if neither

Depositions.

(c) *Beard v. Powis*, 1751, 2 Ves. sen. 399.

(d) 1 Ves. sen. 185.

(e) *Cook v. Bolton*, 1828, 5 Russ. 282.

(f) *Clapham v. Phillips*, 1674, Rep. temp. Finch. 169; *Buckingham v. Sheffield*, 1739, Amb. 586.

(g) *Boddy v. Kent*, 1816, 1 Mer. 361.

Effects
of Abatement.

the commissioners nor the witnesses have received notice of the abatement (*h*).

Judgment.

And where a *feme sole* sued out a commission to examine witnesses, and married before they were examined, their depositions were ordered to stand (*i*).

After a cause has been heard, the judgment follows as a matter of course, and is, for most purposes, considered as contemporaneous with the hearing. It has been held, therefore, that the death of a defendant after the hearing, but before judgment has been pronounced, will not prevent the Court from giving its judgment (*k*).

Order on
appeal.

Where one of several defendants died pending their joint appeal to the House of Lords, and the House of Lords admitted his representatives, on their petition, as parties to the appeal, and made an order varying the decree below, and dismissing the bill as against the deceased defendant with costs; it was held that that order might be made an order of the Court below without first reviving the suit, because it was an order against the *defendant*, as the party on the record, and not against his representatives (*l*).

(*h*) *Thompson v. Took*, 1733, Dick. 115; 3 P. W. 195; *Peters v. Robinson*, 1747, Dick. 116; *Sinclair v. James*, 1755, *ibid.* 277.

(*k*) *Davies v. Davies*, 1804, 9 Ves. 461.

(*l*) *Thorpe v. Mattingley*, 1842, 1 Phill. 200.

(*i*) *Winter v. Dancie*, Toth. 163.

CHAPTER VI.

OF REVIVOR.

AFTER a suit has become abated, it may be, as we have already seen, revived or restored to its former condition (a) by certain processes, all producing the same result in the end, but varying in their forms, names, and modes of operation according to the mediate or immediate privity with the deceased party in which the party stands, upon whom the surviving interest devolves.

Nature
of Revivor.

The suit may also, if necessary, be only *partially* revived. Thus, if consistent with the relief prayed, a suit may be revived so far as the interest of a deceased party's *real* estate is concerned therein, by bringing his heir before the Court, without bringing his *personal* representative before the Court in respect of the interest of such party's personal estate, or *vice versa* (b).

But although a suit may be revived as to part of the *matter* in litigation, it cannot be revived as to part of the *proceedings*. That is, a revivor cannot be made to operate from a particular period of the cause only ; “ but the whole proceedings, bill, answer, and orders made in the cause, must stand revived ; for the re-

(a) It must, however, be remembered that the adoption of the permission to revive the suit is wholly optional, and the old or new plaintiff, as the case may be, may, instead of adopting that course, altogether abandon the abated suit, and commence *de novo* by original bill. *Spencer v. Wray*, 1637, 1 Vern. 463 ; 3 Atk. 486.

(b) *Ferrers v. Cherry*, 1701, 1 E. C. Ab. 4 ; Ld. Red. ed. 4, p. 80.

Nature
of Revivor.

vivor is but a continuation of the same suit, and it cannot be a continuation of the same suit unless it proceeds from where the other left off (c)."

Where a suit has been revived by a wrong person, as an executor under a revoked will, the proper course for the right party to pursue, is to revive *de novo*. He cannot obtain any benefit from the wrong revivor (d).

A revived suit may be again and again revived until the interest of the thing in question be determined (e).

For what Pur-
poses a Suit
may be revived.

We have said, that whenever an abatement occurs, the suit may be revived. This, however, is universally true only as regards the *machinery* of the suit, for with reference to the *subject matter* of the suit it must be received with some modification. If at the time of the abatement the suit has become entirely concluded with the exception of the payment of the costs, the parties will not in general be permitted to revive it merely for that purpose (f). Lord Hardwicke, however, in many cases expressed his opinion that he thought this a very hard rule.

Not for costs.

It makes no difference whether the abatement arises from the death of the party who is *to pay* the costs, or the death of the party who is *to receive* them. It is true that in *Morgan v. Scudamore* (g), where the party who was to receive the costs died after the Master had

(c) For. Rom. 174.

(d) *Huggins v. York Buildings Co.*, 1740, 2 E. C. Ab. 3; *Ryland v. Latouche*, 1820, 2 Bli. 566.

(e) *Att. Gen. v. Barkham*, 1661, Hardress, 201.

(f) *Kemp v. Mackrell*, 1754, 3 Atk. 811. This rule, however, appears to apply to abatements by *death* only, and not to abatements by *marriage*. In *Sayer v. Sayer*,

1723, Dick. 42, where the decree gave a female plaintiff her costs, and was signed and enrolled, and the accounts taken, and the plaintiff married before the costs were taxed, she and her husband were held entitled to revive the suit for the costs.

(g) 1794, 2 Ves. jun. 313; 1796, 3 Ves. 195.

settled the amount, but before the report was signed, Lord Rosslyn is reported to have said that, in analogy to the rules of common law, he doubted whether the representative of the party who was *to receive* the costs might not revive for costs untaxed, although it would be otherwise where the party who was *to pay* them died, because this would involve a question as to assets with his executor; but in *Jupp v. Geering* (*h*), Sir John Leach, V. C., after agreeing with Lord Rosslyn that there could be no revivor against *the payer's* representative for costs untaxed, said that his Lordship must have been misunderstood by the reporter of the last case, when he made him say that there was a difference at law, as to costs, between the deaths of the payer and the receiver, for that there was no such difference.

For what Pur-
poses a Suit
may be revived.

The above rule applies only to costs which remain *untaxed* at the time of the abatement. Where the costs have been actually taxed, and the Master's certificate signed, there may be a revivor for costs, because they have then become a judgment debt, and a judgment may be revived in equity as at law (*i*). But in order to entitle a party to revive, the taxation must have been complete by the Master's having signed his certificate, otherwise the costs will be considered as untaxed (*k*).

Unless the
costs have been
taxed.

So where the plaintiff's solicitor, at the request of the defendant's solicitor, had agreed to postpone the taxation of costs decreed to be paid to the plaintiff, on an undertaking that the plaintiff should not be prejudiced thereby, and the plaintiff died after the

Or left un-
taxed by
special agree-
ment.

(*h*) 1820, 5 Mad. 375.

Ves. sen. 579; *Hall v. Smith*, 1785,

(*i*) *Edgill v. Brown*, 1732, Dick. Dick. 649; 1 Bro. C. C. 438; 62; *White v. Hayward*, 1752, *Louten v. Corporation of Colchester*, Dick. 173; 2 Ves. sen. 461; *Kemp* 1817, 2 Mer. 113.

v. Mackrell, 1754, 3 Atk. 811; 2

(*k*) 3 Dan. Ch. Pr. 198.

For what Pur-
poses a Suit
may be revived.

costs were taxed, but before the Master's certificate had been signed, the plaintiff's representative was allowed to revive the suit, and to procure the Master to make his certificate *nunc pro tunc*, and date it before the death of the plaintiff; Sir L. Shadwell, V. C., observing, that the agreement amounted, in fact, to an agreement that the suit should be revived (*l*). But it is to be remarked, says Mr. Daniell (*m*), that the circumstances of that case were very special, and cannot in any way be considered as impugning the general rule which has been laid down.

Or where the
costs are to be
paid out of a
particular fund.

Another exception to the above rule respecting revivor for costs, is where they have been directed to be paid out of a particular estate or fund (*n*); or are decreed against an executor out of assets (*o*). In this case they do not "die with the person," but are considered as a charge or lien on such particular estate, fund, or assets.

Of course, the above doctrine as to costs applies only where all the rest of the suit has been wound up. If any thing else, however slight, remains unexecuted at the time of the abatement, there may be a revivor. "If by the decree the party is to pay a sum of money (*p*), or if a duty is decreed, or if he is to deliver over a bond or deed, or if any thing is annexed to the decree besides costs, the suit may be revived (*q*)."

For further
discovery.

It has been said that where a suit for discovery abates after answer, the plaintiff cannot revive it for the purpose of obtaining a further discovery (*r*). But this appears to be a mistake; the plaintiff may revive

(*l*) *Tucker v. Wilkins*, 1835, 7 Sim. 349.

(*m*) 3 Dan. Ch. Pr. 199.

(*n*) *Blower v. Morretts*, 1754, 3 Atk. 772; Dick. 254; *Kemp v. Mackrell*, 1754, 3 Atk. 811; 2 Ves. sen. 579; *Jenour v. Jenour*, 1805, 10 Ves. 572.

(*o*) *Blower v. Morretts*, *ubi supra*.

(*p*) *Johnson v. Peck*, 1752, 2 Ves. sen. 465; *Blower v. Morretts*, *ubi supra*.

(*q*) For. Rom. 181.

(*r*) *Gould v. Barnes*, 1748. Dick. 133; *contra*, S. C., Beames on Costs, ed. 1840, pp. 20, 133.

for further discovery, although the defendant cannot revive for the purpose of obtaining his costs (s). For what Purposes a Suit may be revived.

So if, in drawing up a decree, some things have been omitted, and the defendant dies after the decree has been enrolled, the suit may be revived for the purpose of supplying the omission (t). To supply an omission in a decree.

We will now inquire what party is entitled to revive an abated suit, and, where several are entitled, which has the prior right. And it must be understood that the question here is, not who is the person that succeeds to the interest of the deceased party, which is a question of general law, and foreign to the present treatise, but whether that person, whoever he may be, or some surviving party to the suit, and which of such surviving parties, is the proper party to revive the suit. What Party may revive a Suit.

The first great distinction on this subject relates to the period at which the suit has arrived when it becomes abated; that is to say, whether a decree has been pronounced in it or not. After decree, all the parties to the suit, whether plaintiffs or defendants, are equally actors in the suit, and a defendant, or a person who succeeds to a defendant's interest, is as much interested in prosecuting a decree, and as much entitled to do so, as a plaintiff, or a person who succeeds to a plaintiff's interest; whereas, until decree, the suit belongs exclusively to the plaintiff or plaintiffs, and none but a plaintiff, or a person succeeding to a plaintiff's interest, has any right to carry it on.

This being premised, let us first consider this question in the case of a suit abating before decree. Before decree. If there be a sole plaintiff, and the abatement is occasioned by the death of a defendant, the plaintiff is obviously the only person who can revive. If there be a sole plaintiff, and the abatement is occasioned

(s) *Dodson v. Juda*, 1804, 10 Ves. 31.

(t) *Williams v. Arthur*, 1663, 1 Ch. Ca. 37.

What Party
may revive a
Suit.

by his death, the person who succeeds to his interest is clearly the only person entitled to revive. If there are several plaintiffs, and the abatement is occasioned by the death of a defendant, the plaintiffs alone can revive, but they may either all join in reviving, or any one or more of them may revive alone (*u*), bringing the others before the Court as defendants. If there are several plaintiffs, and the abatement is occasioned by the death of one of them, the suit may be revived either by the surviving plaintiffs, or any of them, or by the person who succeeds to the interest of the deceased plaintiff, or by that person jointly with the surviving plaintiffs or any of them (*x*), always however bringing forward as defendants, such of the plaintiffs, or their representatives, as do not join in reviving.

There is no
priority.

In the latter cases, where the right of reviving is not confined to one person, it may be questioned whether all the persons entitled to revive have an equal right to do so, or whether there exists any rule of priority among them, excluding some from reviving until the others have declined to exercise their right to do so. It would appear from the above cited case of *Livesey v. Livesey* (*y*), that a revivor by any co-plaintiff will be sufficient to prevent the other co-plaintiffs from reviving, whether they have refused to join in such revivor, or not; but it has been held that where the representative of a deceased co-plaintiff revives, he must apply to the surviving co-plaintiffs to join with him in his revivor, before he can proceed to revive without them and bring them forward as defendants; and that in his bill he must state that he has made such application, and that the surviving co-plaintiffs have refused to join with him (*z*). It may,

(*u*) *Finch v. Winchelsea*, 1727, 11 Ves. 306.
 1 E. C. Ab. 2; *Livesey v. Livesey*, (*y*) 1829, 1 R. & M. 10.
 1829, 1 R. & M. 10. (*z*) *Anon.* 1824, 2 Law J.
 (*x*) *Fallowes v. Williamson*, 1805, Chy. 170.

however, it is apprehended, be laid down, that in this, and in other cases, in which there are several persons qualified to revive, all are equally qualified; and that if they do not agree among themselves who shall revive, the person who has the start in point of time acquires the best right to revive the suit.

What Party
may revive a
Suit.

This is of the less consequence because it has been held that the person reviving a suit does not thereby necessarily acquire the conduct of it, if there are persons still in existence who had originally such conduct (*a*). It is true that the case cited in the note is a case of abatement *after* decree; but it is apprehended that the same principle applies to cases of abatement before decree, and that no person will be allowed to wrest the prosecution of a suit from those who instituted or were conducting it, merely on the ground of his having been more expeditious than they, in reviving after abatement.

In consequence of the rule that none but plaintiffs, or those who succeed to plaintiffs' interests, can revive before decree, the defendants to a suit may be thrown into a painful predicament by any indecision on the part of those who alone can determine whether the suit shall be revived or not. A suit may be kept hanging over the heads of such defendants for an indefinite period, for they cannot in strictness move, in an abated suit, to dismiss the bill, and they are incapable of reviving the suit for the purpose of making that motion. The hardship of this has induced the Court, on some occasions, to interfere on a defendant's behalf, and to entertain a motion on his part, calling on the party entitled to revive, to decide within a given period whether he will revive the abated suit or abandon it for ever;—whilst in other cases the Court, al-

Whether a
defendant may
move for dis-
missal in de-
fault of revivor.

(*a*) *Burney v. Morgan*, 1823, 1 S. & S. 358.

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though acknowledging the abstract justice of such an interference, has considered itself precluded on technical grounds from taking any step in the matter.

Thus, in *Adamson v. Hall* (b), where an abatement occurred by the death of a co-plaintiff, Lord Eldon, on the application of the defendant, ordered the surviving plaintiffs to file a bill of revivor within three weeks, or that in default thereof the original bill should stand dismissed with costs.

In *Burnell v. Wellington* (c), where a defendant died, Sir Lancelot Shadwell, V. C., made the same order, on the motion of the defendant's representative, the time allowed to the plaintiff to revive being a month.

In *Canham v. Vincent* (d), however, where the abatement occurred by the death of a sole plaintiff, the same learned judge refused to make such order.

But in *Chowick v. Dimes* (e), where a sole plaintiff died and the defendant moved that his representative might be ordered to revive in a limited time, or that the bill should be dismissed without costs, Lord Langdale, M. R., after discussing several cases in favour of the motion, proceeded thus ; " These orders were made by Lord Eldon ; and although it does not appear that in any of them the representative of the deceased party appeared and resisted the motion, yet I cannot suppose that orders so special passed without consideration, or that they are such as would not have been made if the representatives had appeared and stated no sufficient reasons against them. And although there might, as I conceive, have been some modification of the orders

(b) 1823, T. & R. 258, reversing *S. C.* 1 S. & S. 249.

(c) 1834, 6 Sim. 461.

(d) 1838, 8 Sim. 277. It appears, however, that His Honor subsequently altered his opinion

on this point; *vide S. C.* cited 3 Beav. 294, n.

(e) 1840, 3 Beav. 290; *vide etiam Chichester v. Hunter*, 1841, 3 Beav. 491.

as to costs, if the representatives had appeared, there seems no reason to dispute the regularity of the orders in any other respect; and I apprehend that if these orders had been brought to the attention of the Vice Chancellor, he would have decided the case of *Cunham v. Vincent* differently. The inconvenience would undoubtedly be very great to the defendant if it were left to the option of the administrator of a deceased sole plaintiff to keep the defendant in a state of uncertainty as to the prosecution of the suit, for an indefinite period; whilst, on an application of this kind, the administrator appearing may ask for a reasonable time to make up his mind whether he will go on with the suit or not." His Lordship added; "The cases which I have mentioned were all of them cases in which injunctions had been granted; but it does not appear to me that that is a circumstance which makes any real difference in the question. Having regard to these cases, and to the analogous cases of defect by bankruptcy and abatement by the marriage of a *feme sole* plaintiff, I am of opinion that this motion should be granted, unless it should appear that in consequence of the whole interest of the deceased plaintiff not being vested in his legal personal representative, some further notice is yet wanting (*f*)."

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Lastly, in *Lee v. Lee* (*g*), where an abatement occurred by the death of a sole plaintiff, Sir James Wigram, V. C., refused to follow the authority of *Chowick v. Dimes*. After expressing his opinion that

(*f*) In the above case of *Chowick v. Dimes*, the dismissal of the bill was moved for *without costs*; because, if the representative of the deceased plaintiff does not adopt the suit, he is, as we have seen, not liable to the costs of it; and also because, if he were liable, the motion would virtually, although

not actually, have been a revivor for costs only, which, as we have seen, the Court will not generally permit.

(*g*) 1842, 1 Hare, 617. The case of *Dryden v. Walford*. 1842, 1 Y. & Coll. C. C. 625, is exactly similar, where Sir J. L. Knight Bruce, V. C., held the same opinion.

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the practice of the Court ought, as matter of abstract justice, to be such as the decision in *Chowick v. Dimes* supposed it to be, His Honor said; “Considering the question apart from authority, it appears clear to me that I can have no right to make the order prayed. The suit being abated, and there being no plaintiff remaining upon the record,—no one who has ever made himself or been made a party to the suit,—there is, in fact, no suit in which I can make an adverse order against any one. There are not, either in form or substance, contending parties between whom an order adverse to either can be made; and unless and until the representatives of the deceased plaintiff are compelled to appear, or appear gratis, or are in default for not appearing, the Court can have no jurisdiction to make any adverse order against them. Now, in fact, they have not appeared. If the relative positions of the defendants and the representative of the deceased plaintiff are such as to entitle the former to compel the latter to appear in the cause, the regular mode of doing so must be by subpœna or other process of the Court. To such process the representatives of the deceased plaintiff would be bound to yield obedience. But this case would, I believe, stand alone in the practice of the Court, if the defendants have a right to treat the representatives of the deceased plaintiff as being in default for not appearing (which can be the only ground for acting against them) simply because they have not appeared upon a notice of motion given by the defendants at their own mere will, in a non-existing suit, with which those representatives have never in any manner connected themselves.” His Honor distinguished the case of dismissing a bill in default of revivor from the cases of permitting injunctions to drop in default of revivor within a limited time, and of dis-

missing a bill as against the assignees of a bankrupt in default of their commencing a supplemental suit within a limited time, saying that in the former case the Court would be making an adverse order against a person not a party to any existing suit, while in the latter cases it only permits the abatement, or the efflux of time, to produce its natural consequences in default of revivor or of prosecution of the suit, and gives the notice by way of indulgence.

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His Honor also remarked that “the case of *Adamson v. Hall*, in which one of several plaintiffs died, leaving the others surviving, and the cases in which a person has married a sole female plaintiff, did not necessarily furnish a precedent for the case before him, in which the party to be affected by the order was, both in form and substance, a stranger to the record. But with respect even to those cases, considering how little the subject had been discussed, he could not help doubting their regularity, regard being had to the known effect of an abatement of a suit upon the right to costs; [the bills having in those cases been dismissed *with costs*, which was in effect a revivor for costs]. And if in that respect the orders were irregular, it could not under the circumstances but shake their authority altogether.” The same remarks apply equally, it is apprehended, to the case of *Burnell v. Wellington*, although His Honor seems to have inadvertently included that case among those in which the suit abated by the death of a sole plaintiff, the abatement having been in fact caused by the death of a defendant.

But whether a defendant may or may not move in an abated suit, before decree, to dismiss the bill for want of prosecution if the representatives of the deceased plaintiff do not revive in a given time, it seems that at least he may prevent such representatives from com-

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mencing *a new suit* respecting the same matter until they have paid the costs of the abandoned suit. Thus, in *Altree v. Horden* (*h*), a surviving plaintiff died, and the suit thereby became wholly abated, but no application was made by the defendants that the representatives of the surviving plaintiff might revive the suit, nor did the representatives of such plaintiff take any proceedings to revive the suit; but shortly afterwards they filed an entirely new bill against the same defendants. This bill was founded upon the same matters, and sought the same sort of relief, as formed the foundation and prayer of the original bill; and it appeared that it contained the same statements and allegations as would have been contained in the first bill if leave had been given to amend it. On a motion by four of the defendants to the second bill, to take that bill off the file with costs to be paid by the plaintiffs, or that all proceedings in the second cause might be stayed until the plaintiffs in that cause should have paid those four defendants their costs in the first cause; Lord Langdale, M. R., said, “that, with respect to the new bill, he thought he could only treat it as such a bill as would have resulted from an amendment of the original or first bill. In that case it surely could not be contended that those who were seeking to have the benefit of the former proceedings, and the discovery obtained in the former proceedings, and who founded their allegations in the present bill upon the statements made in the answers to the former bill, were to have all the benefit of that suit, and yet to lay aside their proceedings in such a manner as to give the defendants no opportunity, in any stage of the cause, to apply for any of the costs to which they had been subjected.” Again—“It is not enough to say

(*h*) 1842, 7 Jurist, 247.

that, if the former suit had been prosecuted, the plaintiffs might never have had to pay costs. Very probably it might have been so. That suit might have been prosecuted, and there might have been a simple bill of revivor, and for any thing that can be known to the contrary the defendants might not have had their costs, but might have had to pay costs. But though that might have been so, it does not appear to me that the plaintiffs can abandon the cause altogether, depriving the defendants of all opportunity of ever trying the question of costs, and, taking themselves all the benefit that could be got from it, leave the defendants wholly remediless." His Lordship accordingly ordered that all the proceedings in the second cause should be stayed, until the costs had been paid in the first cause.

What Party
may revive a
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We now come to consider the question what party is entitled to revive the suit where an abatement takes place *after decree*.

After a decree has been pronounced in the cause, the rights of the several parties, both plaintiffs and defendants, are ascertained, and they are all interested in the future proceedings. If, therefore, a suit abates after decree, it may be revived by a defendant or the person who succeeds to a defendant's interest, as well as by a plaintiff or a person who succeeds to a plaintiff's interest (*i*); and it does not appear that in this case any one party has priority over another, but the rule will apply, *qui prior est tempore potior est jure*.

Thus, in the case of *Burney v. Morgan* (*k*), where a bill had been filed by Lady Pryce, the owner of an estate, and by Burney and Morgan, incumbrancers on

(*i*) *Williams v. Cooke*, 1805, 10 Ves. 406; *Ld. Red. ed.* 4, p. 79; and see *Ld. Stowell v. Cole*, 1690, 2 Vern. 219; and *Lady Stowell v. Cole*, 1693, *ibid.* 296. But it seems not after a *decretal order* only. *Vide Horwood v. Schmedes*, 1806, 12 Ves. 311.

(*k*) 1823, 1 S. & S. 358.

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that estate, against a purchaser for specific performance ; and an abatement being caused by the death of Lady Pryce, the suit was revived by the surviving plaintiffs, and a decree was then made, and afterwards Burney died, and the suit was revived by his personal representative, Morgan having declined to do so, and afterwards Morgan died, and then his personal representative revived the suit, and applied to the Court for an order to restrain Burney's representative from proceeding further ; Sir John Leach, V. C., (after holding that the revivor by Burney's representative was not irregular), said ; " It is a mistake to suppose that in consequence of this bill of revivor Morgan lost any right to prosecute the decree which he before possessed. Every party to a suit is an actor after a decree, and therefore the representative of Burney, and Morgan, and the other defendants, were all entitled to prosecute the decree upon the order for revivor. And if the situation of Morgan, as surviving plaintiff in the original suit, entitled him to a preference over the representative of Burney as a plaintiff in the bill of revivor, where both were acting with equal diligence, it was his own fault if he did not assert it.

" If the representative of Burney had a right to file a bill of revivor, it necessarily follows that the representative of Morgan had an equal right so to do upon the death of Morgan, and that his bill is regular.—To this bill of revivor the representative of Burney was a co-defendant, and stands now in the same situation in the cause, as Morgan himself stood after her [*i. e.* Burney's representative's] bill of revivor. But in truth they are all actors, and this varying relation of plaintiff and defendant makes no substantial difference."

A defendant

When a defendant wishes to revive a suit, it has

been supposed that he must give notice of his intention to the party conducting the cause, as being the first entitled to revive. But it seems to follow from the above case that such notice is unnecessary. “A bill of revivor by a defendant,” says Lord Redesdale (*l*), “merely substantiates the suit, and brings before the Court the parties necessary to see to the execution of the decree, and to be the objects of its operations; and does not litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided.”

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need not give
notice of his
intention to
revive.

It was formerly held that a defendant could only revive a suit after a decree *for an account*, and that it was only in that case that he became an actor, in consequence of the possibility of such account leaving a balance in his favour (*m*). But this doctrine has been overruled, and it is now settled that his right to revive is not confined to such cases (*n*), nor even to cases in which he might have himself filed the original bill (*o*), but that he may do so wherever he has an interest.

A defendant
may revive
whenever he
has an interest.

A defendant will not, however, be allowed to revive a suit, where he has no interest under the decree, that is, where he is not interested in the further prosecution of the suit. And where the object of a bill of revivor by a defendant is not to continue the suit, but merely to put an end to an injunction and to be allowed to proceed at law, it will be liable to a demurrer (*p*), and the defendant must proceed to get rid of the injunction in the ordinary way (*q*).

(*l*) Ld. Red. ed. 4, p. 79.

(*m*) *Kent v. Kent*, 1702, Pr. Ch. 197. *Anon.* 1748, 3 Atk. 691.

(*n*) *Finch v. Winchelsea*, 1727, 1 E. C. Ab. 2.

(*o*) *Deraynes v. Morris*, 1835, 1 Myl. & Cr. 213, 225.

(*p*) *Horwood v. Schmedes*, 1806, 12 Ves. 311. In this case the at-

tempt by the defendant to revive was after a decretal order only, and not after decree.

(*q*) But *quare* whether the injunction would not naturally fall to the ground, of itself, upon the abatement? *Vide* 1 Hare, 622, and *supra*, Chapter V.

Mode
of Revivor.

We will now consider the means by which revivor is effected.

For this purpose we must divide the subject into two heads, for the mode of revivor will be different according as the interest represented by the deceased party has devolved on a person claiming under him by *operation of law*, as an heir or executor, or on a person claiming under him by means of *his own act*, as a devisee.

Where the interest devolves by operation of law.

In the first case there is no additional matter to be litigated in the suit, because, as the interest devolves by the operation of law, the title of the person on whom it devolves cannot be questioned, if his identity be established; and if this identity be denied, it must be disputed in some other Court than the Court of Chancery. But in the second case there is additional matter to be litigated in the cause, namely, the title by which the new party claims to succeed to the interest of the former party; and this must be either admitted or proved before the main suit can be disposed of.

Where the interest devolves by the act of the deceased.

To illustrate this by an example.—Suppose a suit to concern land of which the party dying was seised in fee simple. The interest which he represented has survived him; and if he died without devising it, which will be assumed *primâ facie*, has of course descended upon his heir. This is a rule of law which cannot be disputed, and therefore all that is wanting to revive the suit is to substitute the heir for the deceased party. If the person brought forward for that purpose is admitted to be the heir, there is nothing to be tried;—if on the contrary it is denied that he is the true heir, a question is indeed raised, but one which it belongs exclusively to a Court of Law to determine. In neither case has the death of the tenant in fee created

any additional matter to be litigated in the Court of Chancery (*r*).

Mode
of Revivor.

But suppose the deceased party to have interfered with the natural course of law by devising the land, the title of the devisee must be established before he can succeed to the place of his testator. It is not enough for him, as in the case of the heir, to prove his identity,—to show that he is the same person as is named in the will. The actual existence and legal validity of that will, and the true construction of the passage in it on which he rests his claim, are necessary links in his title, and must either be admitted or proved to the satisfaction of the Court.

Although therefore in both cases the suit is capable of being revived, yet the process by which that is effected, is different in each case.

(*r*) It is true that issue may be joined in the suit in Chancery on the question *heir or no heir*, as will be seen hereafter; but to produce this, a special denial of heirship must be made by plea; whereas, in

the case of a devisee, the devisee must prove his title, even though the defendant does not deny it, but merely states his ignorance of how the fact is.

CHAPTER VII.

OF REVIVOR BY SIMPLE BILL AND ORDER.

Nature of
the Process.

WE have seen that where the new party claims by operation of law, there is no fresh matter for litigation in the suit. The death of the former party, and the succession of the new one to his rights, will be taken for granted without admission or proof, unless it be specially put in issue by the opposite party in the manner hereafter mentioned. Still less is there any room for litigation of the original matter before the Court, the rights as to which are not altered by the mere devolution of them from ancestor to heir, or from testator to executor. Accordingly, all that is requisite is to inform the Court of the death and succession which have happened, which is done by a bill ancillary to the original bill, and which prays that the suit may be revived;—from which circumstance it is called a *bill of revivor*. Putting no new matter in issue, it requires no answer, nor is it set down to be heard; but after a certain interval an order for the revivor of the suit issues as of course.

One bill of
revivor in
several suits.

Where there is an original bill, and a cross bill thereto, there must generally be a bill of revivor in each cause. But if the bills regard an account, and there is a decree for an account, the two causes become thereby so consolidated that one bill of revivor, praying for a revivor of the whole, will revive both causes (*a*). And where one decree had been taken in

(*a*) Coop. Eq. Pl. 88; Wyatt, Pr. Reg. 88; For. Rom. 174.

three suits, and a party died who was a plaintiff in one suit, and a defendant in the other two, one bill of revivor filed against his representative was held sufficient (b). Nature of the Process.

It may happen that the same event which causes abatement is accompanied by some circumstance important to the conduct of the suit, and which ought to be brought before the Court. This, however, is not matter for a simple bill of revivor, whose province is merely to state the abatement and the transmission of interest to the person by or against whom the suit is to be revived. It would properly be introduced by a supplemental bill; but as this would necessitate the contemporaneous filing of two bills, the Court allows the matter in question to be associated with the matter of the abatement, and to be brought before the Court in a single bill, which, from its double nature, is called a *bill of revivor and supplement* (c). Bill of revivor and supplement.

It appears that the bill of revivor and supplement must not bring forward supplemental matter in corroboration of the *merits of the case*, but only such as goes to explain the *machinery* of the suit. Thus where a bill was filed by the assignee of an insolvent debtor, to restrain a party in possession of certain estates claimed by the assignee in right of the insolvent, from setting up certain outstanding terms to an action of ejectment; and a demurrer was put in to the bill, but was not set down to be heard; and eight years afterwards the defendant died, and then the assignee and the insolvent died, and the new assignee filed a bill of

(b) *Moore v. Elkington*, 1840, 2 Beav. 574. file, the whole bill will be taken off the file, although it may have been

(c) Where a bill of revivor and supplement is irregularly filed, so far as it is a bill of supplement, and is ordered to be taken off the not irregularly filed as a mere bill of revivor. *Hodson v. Ball*, 1842, 1 Phill. 177.

Nature of
the Process.

revivor and supplement, praying to have the suit revived and the demurrer heard, and for more extensive relief than was prayed by the original bill; it was held that the plaintiff was entitled to file a bill of revivor and supplement, alleging supplemental matter necessary to shew by and against whom the order to revive ought to be obtained, for the purpose of having the demurrer disposed of, but was not entitled to claim the same or additional relief by adding supplemental matter in corroboration of the original claim, and not required for the purpose of showing by and against whom the order to revive should be obtained (*d*).

Where a defendant dies before appearance to the original bill.

It has already been mentioned that until a person named as defendant in a bill, has appeared to that bill, he is not considered as a party to the suit. Consequently, if that person dies without having ever appeared, the suit having never existed as against him can hardly be said to have abated by his death. A bill of revivor would therefore be out of place, for the imperfection was inherent in the suit from the beginning. The case therefore falls within the description of imperfections mentioned in the second chapter of this treatise, and is remedied in the manner there pointed out.

Revivor by
scire facias.

Where an abatement takes place after a decree which has been signed and enrolled, there is also another way of reviving the suit besides a bill of revivor and order; namely, a subpœna in the nature of a *scire facias* directed against the representative of the deceased party.

On the return of this subpœna, the party against whom it is directed may shew cause against the revival of the decree by making such defence thereto as

(*d*) *Bampton v. Birchall*, 1842, 6 Jurist, 833.

he may be advised (*e*). And it appears that there is no other way of making a defence to such a process. Nature of
the Process. Thus where a plaintiff died after decree, and a demurrer was put in to a subpœna in the nature of a *scire facias*, for that the party who brought it did not thereby allege himself to be the heir or executor of the party mentioned in the decree, such demurrer was overruled, “because the subpœna is no record, nor any where filed;” but it was said that cause must be shewn on the return of the writ upon the order, which order mentions the party who brought the writ to be the heir or executor (*f*).

If upon cause being shewn against the revivor, the opinion of the Court is in favour of the party shewing cause, the suit will be dismissed as against him with costs (*g*). But if he does not oppose the revivor of the decree, or, having opposed it, the opinion of the Court is against him, interrogatories may be exhibited for his examination respecting any matter necessary to the proceedings. If he has opposed the reviving of the decree on the ground of facts which the plaintiff thinks proper to dispute, the plaintiff must exhibit interrogatories against him relative to such matters; and he may answer or plead to such interrogatories as he might have done to a bill; and upon issue being joined and witnesses examined, the matter may be fully heard and determined by the Court (*h*).

It is optional to a party to revive a decree signed and enrolled by this process, or by a common bill of revivor (*i*). The *scire facias* revives only the decree, and not any of the subsequent proceedings (*k*); for these

(*e*) Vide *Ward v. Lake*, 1664,
3 Ch. Rep. 9; Ld. Red. ed. 4, p.
69.

(*h*) Ibid. p. 70.

(*i*) *Croster v. Wister*, 1672. 2
Ch. Rep. 35.

(*f*) *Ward v. Lake*, *ubi supra*.

(*k*) Ibid.

(*g*) Ld. Red. ed. 4, p. 69.

Nature of
the Process.

can only be revived by bill of revivor. For this reason, and from the enrolment of decrees being now much disused, the course of proceeding by *scire facias* is not much adopted, and it has become the practice to revive in all cases indiscriminately by bill (1).

Abatement by
marriage.

In the case of abatement by the marriage of a female plaintiff, the parties who revive the suit of course sue in the same way as parties to an original bill. The bill of revivor therefore is filed by the husband and wife jointly, or if the property in litigation be the separate property of the wife, the bill of revivor must be filed on the part of the wife by her next friend. In this latter case, however, the bill of revivor must be accompanied by a supplemental statement to shew the settlement under which the wife became entitled to a separate estate, and it thereby becomes a bill of revivor and supplement.

Form of the
Bill of Re-
vivor.

We will now consider the general form of the simple bill of revivor.

Original state-
ments.

Lord Redesdale says that the bill of revivor must state the original bill, by which he probably means that it must state *the filing* of the original bill; but it has been sometimes construed to mean that the bill of revivor must restate the statements in the original bill. To put a stop to this practice, it is declared by the Forty-ninth Order of 1841, that it shall not be necessary in any bill of revivor to set forth any of the statements in the pleadings in the original suit, *unless the special circumstances of the case may require it*.

The exception contained in the concluding words makes it necessary for us to inquire how far, and under what circumstances, the matter of the original bill must be noticed in the bill of revivor.

Now the object of a bill of revivor being merely to

(1) *Ld. Red. ed. 4, p. 70.*

continue a suit from the point where it has abated, there can be no advantage in telling the original or the new party any thing which he, or his predecessor, has already been interrogated to and answered. *Primâ facie*, therefore, as has been remarked in considering the form of a supplemental bill, such statements are surplusage and impertinent, as well as productive of useless expense.

Form of the
Bill of Re-
vivor.

Lord Chief Baron Gilbert says (m) that “the bill of revivor need set forth no more of the original bill than this, viz. *That your orator in or about such a time exhibited his original Bill of Complaint in this Honorable Court to be relieved touching certain matters and things therein contained, as by the said bill, duly filed and remaining of record in this Honorable Court, appears; and carry it no further. That the defendant, such a day, put in his answer, as by such answer remaining of record, appears. That witnesses being examined, publication passed, and the cause being at issue came on to be heard such a day; when it was ordered and decreed so and so.* And here are taken in the words of the ordering part of the decree, very shortly, and no more than what is material to the revivor. Or if this short method is not pursued by the drawer, yet he must take care that in the recital of the former proceedings he does them in the shortest manner possible, the shorter the better, since they can be of no use to his client; for the records of the Court are the same whether truly or falsely recited, and from them alone the fact must be determined; and all the defendant hath to do by answer to the bill of revivor is only to set forth that he believes there was such a suit, decree, and proceedings, and refers to the records.”

It is apprehended that the only general rule that can be laid down on this point is, that no more of the

(m) For. Rom. 210.

Form of the
Bill of Re-
vivor.

original case should be stated than is necessary to shew that the interest which was represented by the original party has become vested in his representative. Without a statement to this extent it would not be apparent on the face of the bill of revivor whether the interest of the deceased party survived him at all, or whether, if it survived him, it devolved on his real or personal representative. Whether for this purpose it will be sufficient to confine the statements to the prayer of the original bill, or whether a slight sketch must be given of the statements in the original bill, will depend upon the circumstances of each particular case.

Subsequent
proceedings.

After thus mentioning the original bill, the bill of revivor must go on to state the proceedings which have been subsequently had in the suit, in the manner already noticed by Lord Chief Baron Gilbert. It should then state that, before any further proceedings took place in the suit, the event happened which caused the abatement, and shew how the new party derives his title from the deceased. It should then charge that by the event in question the suit became abated, but that the party filing the bill of revivor is entitled to revive it, and it should pray that the defendant may shew cause, if he can, why the suit should not be revived, and stand and be in the same plight and condition as it was in at the time of the abatement, and in default thereof that the suit may be revived accordingly.

Prayer.

Amendments
of the original
case.

If the plaintiff wishes to amend his case after the defendant has died, it appears that he must insert such amended statements in his bill of revivor, because the new defendant having no office copy of the original bill, there is no other way of amending as against him (*n*). In this case it is apprehended that all the defendants must be parties to the bill contain-

(*n*) *Vide* the analogous case of *Woods v. Woods*, 1839, 10 Sim. 197.

ing the amendments; and the bill will in fact be a bill of revivor and supplement.

Form of the
Bill of Re-
vivor.

Where the suit is revived by the executor of a deceased plaintiff, it appears that he must charge that he has proved such deceased plaintiff's will (*o*). His mere appointment to the office will not be a sufficient qualification.

An executor
reviving must
charge that he
has proved the
will.

Where a suit is revived against the personal representative of a deceased party, it is often necessary to pursue a claim against the assets of such party, by either obtaining from the representative an admission of assets, or taking an account of the estate of the deceased. In this case the bill of revivor must pray not only that the suit may be revived, but also that in case the defendant does not admit assets, the usual accounts may be taken; and the defendant must of course be interrogated as to whether he admits assets or not. The bill in this case therefore is not a simple bill of revivor, but is also a supplemental bill so far as regards the account of assets, and requires an answer, and a decree also if the answer is in the negative. If, however, the defendant admits assets by his answer, the bill will be treated as a simple bill of revivor, and the suit will proceed against the defendant on the mere order for revivor; and indeed in any case such a bill is generally called a bill of revivor only, and not a bill of revivor and supplement (*p*).

Bill of revivor
against execu-
tor may inquire
as to assets.

So where, in a suit by one of the next of kin of a testator against the executor, the decree directed an account of monies come to the hands of the executor, and an inquiry whether any monies had come to the hands of the plaintiff; and the plaintiff died, and his administrator revived the suit and offered to be bound

(*o*) *Humphreys v. Incedon*, 1721,
Dick. 38; 1 P. W. 751.

(*p*) For a precedent of a bill of
this sort, see the Appendix, No. IX.

Form of the
Bill of Re-
vivor.

by a decree to account for such plaintiff's personal estate, and called upon the defendant to answer his bill, he was held entitled to an answer (*q*), the bill in this case being in fact not a simple bill of revivor, but a bill of revivor and supplement.

Where bill of
revivor calls for
answer to
original bill.

If a defendant dies after he has appeared to the bill, but before he has answered it, or before he has answered any amendments of the bill, or exceptions to his former answer, the bill of revivor, although requiring no answer to itself, must pray not only for revivor, but also that the new party may answer those parts of the original bill which the former defendant was required to answer; or that he may answer the amendments or exceptions as the case may be (*r*).

Bill of revivor
after decree
must not con-
trovert the
decree.

It follows from what has been said of the nature and office of a bill of revivor, that if filed after decree it must not attempt to controvert the decree. In *Robinson v. Robinson* (*s*) it was said that "there were cases of bills in the nature of bills of revivor, filed for the purpose of carrying on the former decree, where the Court had sometimes, but seldom, said that the *defendant* might dispute it, but never the *plaintiff*. The decree has determined the question, whether it was then debated or not; and the Court is thereby bound."

Signature.

A bill of revivor must be signed by Counsel, and is filed in the same way as any other bill.

Parties.

Let us now consider what persons will be necessary parties to the bill of revivor.

Original co-
plaintiffs.

As all the parties who institute a suit are of course interested in the subsequent proceedings in such suit, no one of them is permitted to revive such suit after

(*q*) *Branch v. Primrose*, 1839, 3 Jurist, 885. a precedent of a bill of this sort, see the Appendix, No. IX.

(*r*) Ld. Red. ed. 4, p. 77. For (*s*) 1748, 2 Ves. sen. 232.

an abatement, without informing the others. In other words, all the plaintiffs or representatives of plaintiffs in the original suit must be brought before the Court by the bill of revivor, either as co-plaintiffs or as defendants.

Parties.

Thus where a suit instituted by Swinnerton and Barlow, tenants in common, abated by the death of Barlow, and his representatives, Messrs. Fallows, filed a bill of revivor against the defendants, without bringing Swinnerton, the surviving tenant in common, before the Court, either as a co-plaintiff or as a defendant, Lord Eldon said, "If for want of authority I am to reason upon general principles, where joint tenants file a bill, and by the death of one the interest survives, without doubt there is no abatement, but the survivor may go on. But where the interest is that of tenants in common, there is a difficulty in deciding that, if one dies, the representatives of that one may revive without making their companion a co-plaintiff. The first difficulty is of this sort. The plaintiffs in the bill of revivor suggest upon the bill, that they are the representatives, and that they stand in the place of the original plaintiff. The defendant upon this argument either is or is not at liberty to answer. He certainly may shew cause against the revivor in some way. Suppose he does not, and the representatives revive: if the co-plaintiff with the original plaintiff deceased, does not admit that those persons are the representatives, what is there in the state of the record, so put, authorising the Court to say the suit is revived, in that stage, until the surviving tenant in common has done some act acknowledging the relation in respect of which he and the alleged representative agree that there is a right to revive? The surviving tenant in common must have some opportunity of doing that. He may

Parties.

state that he is filing a supplemental bill to bring the real representative before the Court. If he is made a co-plaintiff, by joining, he admits the character of the representative. But suppose he knows the other is not the heir;—that he is obliged to get on with his own suit, and knows another person to be the heir, without whom he cannot get on: what is there upon the record, where the bill of revivor does not make the survivor a co-plaintiff, to shew that he admits the character of the plaintiff reviving?

“ Beyond that there is another difficulty in holding that the representatives may revive without the original co-plaintiff; even if he does admit that they are the representatives. Circumstances may have taken place from which the survivor may know that it would be gross injustice in him to pursue the suit, and that the representatives of the deceased tenant in common know that. Suppose they revive; and, instead of a plea or demurrer, the defendants state the objection by answer, and insist upon it as entitling them to the same benefit as if it had been by plea; the cause may go to a hearing, when revived, in the absence of the original co-plaintiff; and he may be engaged, and without his consent, in further litigation, where he thinks it unrighteous, and, if he had been sole plaintiff, might have desired to have his bill dismissed with costs. In what mode then is he to come and say he will have nothing more to do with the suit?—for there must be some form in which he shall be at liberty to do so. On the one hand there is great hazard of injustice, whether the representatives are so, or not; and upon general principles I should be disposed to hold that the revivor ought to be by both, for it is true that upon a revivor by *scire facias*, all must join. It would be strange upon a *scire facias* to say

that the proceedings were to be put in the same plight, not only as to the persons suing it out, and against whom it was sued out, but against persons to whom it was not addressed and having no knowledge of it.

Parties.

“Next, if the representatives are to file their bill of revivor, and that is only as to the interest of the deceased, though that bill states the original cause as the cause of both, must not the two causes be joined, so that the Court can know in which you are going on? It would be novel, and against the principle of pleading in equity, that, where the interest is entire as to the subject of the suit, though divided in enjoyment, and the defendant might object for want of parties, the bill of the representatives should revive as to that suit, the interest of the other plaintiff not being abated;—and therefore the two causes are joined, though the survivor may have no inclination to go on. What is revived?—the suit as to the interest of the deceased. But then it must, in the contemplation of the Court, be a proceeding at the suit of the survivor, as his interest is not abated, and at the suit of the representative standing in the place of the deceased. The consequence is, all subsequent process must be at the suit of both, and in a cause intituled in the names of both; and it is very difficult to make out that the cause of *Fallowes and others* is the cause of *Fallowes, Swinnerton, and others*.”

Again;—“My opinion is that the proposition in the books is true, that where one tenant in common dies, his representative may revive without the other; but it is true only in a qualified sense. He may revive without making the other a co-plaintiff, but if he does so, he must make him a defendant. The case of joint tenants is not in the least analogous. To bring

Parties.

before the Court in a revived cause all the parties, you must have all upon a record that brings them all together. The course taken in this instance is, that the representatives of one tenant in common revive. But there it no *constat* to the Court, whether the other plaintiff means to take any part in the suit or not. He must therefore be either a co-plaintiff or defendant. The next consideration which leads to great difficulty is, that, unless that is the rule of the Court, there are two causes, which for the purpose of subsequent process I do not know very well how to put together. There is an attachment in the revived cause, but that does not embrace the original co-plaintiff in any respect; and if you could revive without making the original co-plaintiff a defendant, the process must of necessity be intituled in both causes. But that would be error; therefore the cause is not well revived (*t*)."

If however one co-plaintiff has released his interest to the remaining co-plaintiffs, he need not be a party to a subsequent bill of revivor; but in this case the bill of revivor must state such release, and will in fact be a bill of revivor and supplement (*u*).

Original
defendants.

Again, no person ought to be called upon to give an account of his interest in the matter in litigation, without knowing who are the persons calling upon him for such account; but at the same time it is not necessary that such accounting party should be directly informed of a change of interest in other accounting parties (*x*). In other words, although it is

(*t*) *Fallowes v. Williamson*, 1805, 11 Ves. 306. *Vide etiam Gibbs v. Churton*, 1824, 1 C. P. Cooper, 496.

(*u*) *Exton v. Turner*, 1681, 2 Ch. Ca. 80.

(*x*) *Vide Feary v. Stephenson*, 1838, 1 Beav. 45, and *post*, Chap-

ter XI. Although this case is a case of supplemental bill and not of bill of revivor, yet it is apprehended that the dicta there given would apply equally to the latter sort of bill. *Vide etiam Att. Gen. v. Barkham*, 1661, Hardress, 201.

a universal rule that all the original *plaintiffs* or their representatives must be parties to the bill of revivor, it is not a universal rule that all the original *defendants* or their representatives must be so. This will depend upon whether the abatement was caused by the death of a plaintiff or of a defendant. If by the death of a plaintiff, all the defendants must, for the reason above given, be informed of it, and therefore must be made parties to the bill of revivor (*y*); but if by the death of a defendant, the representative of such deceased defendant is the only one necessary to be brought before the Court (*z*).

Parties.

If, then, a sole plaintiff dies before decree, his representative alone can file the bill of revivor, and he must make all the defendants parties to it.

Death of sole plaintiff.

If a co-plaintiff dies before decree, all the remaining co-plaintiffs, as well as the representative of the deceased co-plaintiff, and all the defendants, must be parties to the bill of revivor, as plaintiffs or defendants, whether it be filed by the surviving co-plaintiffs, or by some or one of them, or by the representative of the deceased one.

Death of a co-plaintiff.

If a defendant dies before decree, all the plaintiffs must be parties to the bill of revivor, as well as the

Death of a defendant.

(*y*) In *Oxburgh v. Fincham*, 1684, 1 Vern. 308, it is said that an abated suit need not be revived as against a defendant who has not answered the original bill. But *quære* whether this is the present practice? and whether the decision was not in reality, that there is no revivor against a defendant who has not appeared to the original bill? The registrar's book does not clear the difficulty, as it merely says that the demurrer was allowed, without saying what the demurrer was for.

(*z*) It is said in *The Attorney General v. Barkham*, (1661, Hardress, 201,) that a new defendant brought by bill of revivor, must be named in every subsequent bill of revivor, because he was not named in the original bill. This, however, apparently means only that the bill which brought him before the Court must be stated so as to shew that he is a defendant; not that he must be made a defendant to every subsequent bill of revivor.

Parties. representative of the deceased defendant, but not the other defendants.

Revivor by a defendant after decree.

After a decree has been made in the suit, the defendants as well as the plaintiffs are, as we have before said, considered as actors in the suit, and may revive in case of an abatement. If in such a case a plaintiff or the representative of a plaintiff revives, the parties must be regulated by the above rules; but if a defendant or the representative of a defendant revives, he must in all cases make all the original parties or their representatives parties to the bill of revivor, whether the abatement was caused by the death of a plaintiff or by that of a defendant.

Bill of revivor need not add an entirely new party, however necessary.

It must however be observed that a bill of revivor is not liable to demurrer for want of a party, however necessary, who was not before the Court at the time of the abatement: for it is no part of the office of a bill of revivor to correct such an imperfection, but merely to revive the suit as it stood at the time of the abatement(*a*). If the bill added an entirely new party, it would be a bill of supplement as well as of revivor.

It need hardly be observed that if a person, existing at the time of the original suit, was not a necessary party to it, he cannot be a necessary party to the bill of revivor. Where therefore a suit related to a contract by the defendant respecting his wife's estate, to which she had not been a party, and she had therefore not been made a party to the suit, and the defendant died, the wife was held not to be a necessary party to the bill of revivor against his representative(*b*).

Subpœna.

If the bill of revivor seeks merely to revive the suit, the subpœna taken out must be a subpœna to revive

(*a*) *Metcalfe v. Metcalfe*, 1836,
1 Keen, 74.

(*b*) *Humphreys v. Hollis*, 1821,
Jac. 73.

only. If the bill of revivor requires an answer also, as where it asks for admission of assets, the subpœna must be a subpœna to revive and answer. So also, if the bill of revivor requires the defendant to answer the original bill, as where the original defendant has died before answer, the subpœna must be a subpœna to revive and answer. In this latter case it seems that the defendant must answer the original bill, even though the subpœna taken out is a subpœna requiring an answer to the bill of revivor only (*c*).

Subpœna.

The form of the subpœna issued upon a bill of revivor is given in the Appendix to the General Orders of 1833. It is sued out and served in the same manner as an ordinary subpœna, and if the bill of revivor is filed against a peer, he is served with the usual letter missive and an office copy of the bill of revivor; and if the bill of revivor requires him to answer the original bill, he must be further served with an office copy of the original bill, and if not so served, process for default of answer will be irregular (*d*). But if the bill of revivor is filed against any other person, he must procure for himself an office copy of the bill of revivor, and of the original bill also, if required to be answered.

The next step to be taken after filing the bill of revivor, (being indeed the great object of the bill, which is of no use by itself), is to obtain an Order for revivor. “The filing of a bill of revivor,” says Sir Lancelot Shadwell, V. C., in a case where the executor of a deceased plaintiff filed a bill of revivor, but neglected to obtain the order to revive, “is not an adoption of the original suit, unless the order for re-

Order
for Revivor.

(*c*) *Vigers v. Audley*, 1833, 9 Sim. 403. (*d*) *Ibid*.

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for Revivor.

vor is obtained. The executor has still a *locus pœnitentiæ*. Having filed the bill of revivor, he then pauses; and if he does not adopt the original suit, he is not liable to the costs thereof^(e). The order for revivor must be obtained on motion made for that purpose, and it is irregular to wait for a hearing and then revive by *decree*, even when it is a defendant who revives after decree in the original suit, although in this case the contrary has been sometimes supposed^(f).

With regard to the proper period for moving for the order to revive, we must premise that after a subpœna to revive has been taken out, one of four things may happen. Either the defendant may abscond to avoid being served with the subpœna; or, secondly, being served with it, he may neglect to appear to the bill of revivor; or, thirdly, he may appear to the bill of revivor, and shew no cause against the revivor; or, lastly, he may appear and also shew cause against the revivor.

I. Where the defendant absconds.

I. If the defendant absconds to avoid service of the subpœna, the same process must be adopted for taking the bill *pro confesso* against him, as in the case of an original bill^(g). And where the plaintiff died, and his representative revived the suit, the Court refused, on affidavit of the defendant's absconding, to allow substituted service of the subpœna to revive on his Clerk in Court in the original suit; "for," said Sir Thomas Sewell, M. R., "the bill of revivor is a distinct record from the original bill, and is as much

^(e) *Troward v. Bingham*, 1831, 4 Sim. 483. *Philipps v. Clarke*, 1833, 7 Sim. 234.

^(f) *Pruen v. Luun*, 1828, 5 Russ. 3, *vide etiam a dictum* in ^(g) *Rees v. Mansel*, 1757, Dick. 293.

a new bill as any other bill (*h*); and a defendant's Clerk in Court in one suit is not necessarily his Clerk in Court in every suit (*i*).”

Order
for Revivor.

II. If the defendant does not abscond from service of the subpoena, but after such service neglects to appear to the bill of revivor within the time limited, that is, within four days (*k*), an attachment issues against him as in the case of an original bill (*l*); and if he be taken on such attachment, and neglects to enter an appearance in eight days after the return of the attachment, the plaintiff is entitled, as of course, on motion or petition, to the common order to revive (*m*). And by the same Order, if the defendant cannot be found so as to be taken on such attachment, and a return of *non est inventus* is made thereon, the plaintiff on producing such return, and affidavit of due diligence &c., is entitled, as of course, on motion or petition, at the end of eight days after the return of the attachment, to the common order to revive. In either of the above cases the order must recite as the ground for granting the same that the defendant is in contempt, and that the time limited by the Court to shew cause against reviving the suit has expired (*n*).

II. Where the defendant refuses to enter an appearance.

III. If the defendant enters an appearance to the bill of revivor, or if an appearance is entered for him by the plaintiff (*o*), but the defendant does not within

III. Where the defendant appears but does not shew cause

(*h*) Until revivor, the original bill and the bill of revivor form distinct suits. But after revivor, the original and revived suit coalesce into one suit. *Vide dicta* of Sir J. L. Knight Bruce, V. C., in *Jones v. Smith*, 1842, 6 Jurist, 1078.

(*i*) *Brown v. Lee*; *Lee v. Warner*, 1778; Dick. 545, 546; but now by Orders III. and XVI. Oct. 26, 1842, the Clerks in Court are abolished, and their duties, in these

respects, are transferred to the solicitors of the respective parties.

(*k*) *Vide* form of subpoena in Appendix to the Orders of 1833, and Order XX. August, 1841.

(*l*) Or the plaintiff may, by the Eighth Order of August, 1841, enter an appearance for him.

(*m*) Order VIII. 1833.

(*n*) Order VIII. 1833.

(*o*) Order VIII. August, 1841.

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for Revivor.
against the
revivor.

eight days after his appearance shew cause against the revivor by plea, answer, or demurrer filed, the plaintiff shall be entitled, as of course, upon motion or petition, to the common order to revive, which order shall recite, as the ground for granting the same, that the time limited by the Court to shew cause against reviving the suit has expired (*p*).

Defendant may
move to dis-
miss bill of
revivor, if order
for revivor is
not obtained.

If the plaintiff, having filed the bill of revivor, neglects thereupon to obtain the order to revive, the defendant may move that the bill of revivor be dismissed with costs unless the plaintiff obtains the order to revive within a limited time (*q*). But this dismissal of the bill of revivor does not extend to a dismissal of the original bill, which, until revivor, is, as we have before said, a perfectly distinct suit, and is besides in a state of abatement. Thus in *Troward v. Bingham* (*r*), where a motion was made that the executor of a deceased plaintiff should obtain the order for revivor on his bill, or the original bill and bill of revivor be dismissed with costs, Sir Lancelot Shadwell, V. C., limited the order to the dismissal of the bill of revivor only, saying that "the filing of the bill of revivor is not an adoption of the original suit, unless the order for revivor be also obtained; the executor has still a *locus pœnitentiæ*; having filed the bill of revivor, he then pauses, and if he does not adopt the original suit he is not liable to the costs thereof."

This case however does not decide that the original bill also would not have been dismissed (in spite of the motion being *to that extent* made in an abated suit) if the motion had been to dismiss it *without costs*; and His Honor's change of opinion above mentioned as to the case

(*p*) Order X. 1833. For the form of the common order for revivor, see the Appendix, No. X. 1842, 7 Jurist, 11.
(*r*) 1831, 4 Sim. 483; *sed vide* Bolton v. Bolton, 1825, 2 S. & S. 371.
(*q*) *Chambers v. Middleton*,

of *Canham v. Vincent*(s), together with the arguments used by Lord Langdale, M. R., in the case of *Chowick v. Dimes*(t), might have warranted us in concluding that both the original bill and bill of revivor would, by the present practice, be dismissed in default of an order for revivor obtained by the plaintiff in a given time, the former *without costs*, and the latter *with costs*, were it not for the recent cases of *Lee v. Lee*(u), and *Dryden v. Walford*(x), above quoted, which, on the other hand, determine that the original bill cannot be dismissed, during an abatement, in default of revivor, either with or without costs.

Order
for Revivor.

Where a party is brought before the Court by a bill of *revivor and supplement*, as a defendant to the *supplemental* part only, he cannot move to dismiss the bill for want of the plaintiff's obtaining the order to revive, because he is not interested in the bill so far as it is a bill of revivor(y).

If a plaintiff, or any other party, has filed a bill of revivor on an abatement *after decree*, but neglects thereupon to obtain the usual order to revive, the defendant, as he might himself have filed the bill of revivor, may, after the expiration of the usual time allowed to the plaintiff for obtaining such order, himself obtain an order for revivor on the plaintiff's bill, and that he may be at liberty to carry on the suit(z). And such order of revivor obtained by a defendant, whether obtained on the defendant's or the plaintiff's

After decree,
defendant may
revive on plain-
tiff's bill of
revivor.

(s) 1838, 8 Sim. 277, and *supra*, 625, and *supra*, Chapter VI.
Chapter VI.
(t) 1840, 3 Beav. 290, and *supra*, 4 Jurist, 382.
Chapter VI.
(u) 1842, 1 Hare, 617, and *supra*, Dick. 283; *Gordon v. Bertram*,
Chapter VI. 1816, 1 Mer. 154.
(x) 1842, 1 Y. & Coll. C. C.

(y) *Folland v. Lamotte*, 1840,

4 Jurist, 382.

(z) *Whitehear v. Hughes*, 1755,

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for Revivor.

bill of revivor, will be effectual against all parties, both the plaintiffs and the other defendants (a).

Before the late abolition of the Clerks in Court, all orders for the revival of proceedings must have been served on the adverse Clerks in Court, to the end that they might take notice that the suit was revived, and that such revivor was right (b). Since the abolition of the Clerks in Court, and the substitution, in their places, of the solicitors of the respective parties (c), it is apprehended that the orders for revivor must be served on the solicitors of the other parties.

IV. Where defendant shews cause against the revivor.

Mode of shewing Cause against Revivor.

IV. The defendant may appear to the bill of revivor, and also shew cause against the revivor.

The defence against a bill of revivor, that is, the way in which a defendant, after appearing to the bill of revivor, may shew cause against a suit being revived, is by plea or demurrer. A defendant ought never to *answer* a bill of revivor at all, either for the sake of objecting to the revivor, or for any other reason, unless the bill calls for an answer; and even then, although he must answer it, and although he should in his answer raise an objection to the propriety of reviving the suit, and file his answer before the order for revivor is obtained, yet this objection by *answer* will not prevent the revivor of the suit; the very filing of an answer being held to be a submission to the revivor of the suit, upon which, notwithstanding anything which may be contained in the answer, it is a matter of course to draw up the order to revive (d).

(a) *Pruett v. Lunn*, 1828, 5 Russ. 3.

(b) 2 E. Ca. Ab. 2.

(c) *Vide* Orders III. and XVI. Oct. 26, 1842.

(d) *Lewis v. Bridgman*, 1829, 2 Sim. 465, and *Codrington v. Houl-*

ditch, 1832, 5 Sim. 286, which cases although prior in point of date to the Tenth Order of 1833, must, it is apprehended, be considered as overruling the language of that Order as to limiting the time for shewing cause by plea,

We have seen that, in order to prevent revivor, the defendant must shew cause against it within *eight days*, in default whereof the order for revivor will issue and the suit will be revived. As however a defendant is allowed *twelve days* to demur to any bill of revivor, and *eight weeks* to plead answer or demur (not demurring alone) to a bill of revivor which requires an answer (*e*), he may, it is to be inferred, put in such plea, answer, or demurrer, after the eight days, and therefore after the suit has been revived (*f*). And when the plea or demurrer comes on for hearing, or when, in the case of an answer, the revived suit comes before the Court to be heard, the revivor, although obtained, will, it is presumed, fall to the ground (*g*) if the objection to the revivor appears to be valid, but if otherwise, it will remain effective. And even if no objection should have been made to the revivor, yet if on the hearing of the revived suit it appears that the plaintiff had no title to revive, the objection may be made with effect by parol at that period (*h*).

Mode of shewing Cause against Revivor.

Cause may be shewn after the revivor has been obtained.

We have seen that sometimes the bill of revivor calls for an answer, and that in this case the defendant must answer it. He must however in his answer confine himself strictly to such matters as are stated in

Answer to bill of revivor must be confined to the subject of

answer, or demurrer. And subsequently to that Order, Sir Lancelot Shadwell, V. C., who decided the above cases, says; "The rule is that if a plaintiff files a bill of revivor, and the defendant objects to revive the suit, he must do so by demurrer when the ground of objection appears on the face of the bill; but if the objection is founded on matter extraneous to the bill, he must state that matter by way of plea. If the defendant does not either plead or demur to the bill of revivor, an order to revive may be obtained, as of course, at the expiration of eight days after appear-

ance." *Langley v. Fisher*, 1839, 10 Sim. 349.

(*e*) Order X. 1833; and Order XX. August, 1841.

(*f*) *Vide Boyle v. Blake*, 1828, 2 Hog. 99.

(*g*) *Vide* the analogous case of *Poole v. Marsh*, 1837, 7 Sim. 521, where, under the same Tenth Order of 1833, the plaintiff obtained an injunction at the end of the *eight* days, which fell to the ground upon the defendant's successfully demurring within the *twelve* days.

(*h*) *Harris v. Pollard*, 1734, 3 P. W. 348.

Mode of shewing Cause
against Re-
vivor.

the bill of
revivor.

the bill of revivor, or would be material to his defence with reference to the order to be made upon such bill, just as any defendant must do in his answer to any other bill (*i*), and therefore he is precluded from making his answer to the bill of revivor a means of discussing the merits of any part of the original suit or of any of the former proceedings (*k*), as the object of the bill of revivor is quite distinct from that of such original suit.

The defendant may by his answer to the bill of revivor controvert the title to revive; although as we have seen, an objection by answer will not prevent the revivor, being on the contrary a submission to it; but it may, if well founded, avail the defendant at the hearing. But even for this purpose the defendant must not in his answer enter into the merits of the original suit (*l*), or of the decree if obtained (*m*), because the want of title to revive, if grounded, not on the transmission of interest, but on the merits, can be made out only by the same arguments as would have been good arguments against the merits; and in that case the arguments ought to have been used, if at all, as a defence in the original suit. "The sole question," says Lord Cottenham, C., in the above cited case of *Devaynes v. Morris* (*n*), "is whether the present plaintiff is entitled to put the cause in a proper state to carry on the decree. I am of opinion that according to the practice of the Court he is clearly so entitled, without any reference to the merits of the decree or of the facts. It follows therefore that all the statements in the answer as to such facts, proceedings, and merits, are irrelevant. If the proper time

(*i*) *Wagstaff v. Bryan*, 1829, 1 Myl. & Cr. 213.
R. & M. 28.

(*m*) *Clare v. Werden*, 1706,

(*k*) *Ibid.*; and *Nanney v. Totty*, Dick. 20.
1822, 11 Price, 117.

(*n*) *Ubi supra*.

(*l*) *Devaynes v. Morris*, 1835, 1

for making the defence has been permitted to pass, the omission cannot be supplied in this manner; and if new matter has arisen, varying the situation of the parties, other means exist of bringing it forward; but the right of a party to prosecute the decree, and therefore to do what is necessary for that purpose, cannot depend upon the merits of the decree."

Mode of shewing Cause
against Revivor.

It appears however to have been the opinion of Sir Lancelot Shadwell, V. C., that the defendant may in his answer bring forward *new matter* (although not interrogated thereto by the bill of revivor) for the purpose of controverting the title to revive, or of shewing that the plaintiff cannot have in the revived suit the same decree as he would have had in the original suit. Thus where the original defendants, after answering the statements in a bill of revivor to which they were interrogated, proceeded to say that they had become bankrupts and had obtained their certificates previously to the abatement, and claimed the benefit of the bankrupt laws, and prayed the same benefit of this objection in bar to the bill of revivor as if they had pleaded the same to the bill of revivor or to the original bill, such parts of the answer were held to be not impertinent. "In this case," says Sir Lancelot Shadwell, V. C., "the right of the plaintiffs to revive the suit is not denied by the defendants; but what the defendants mean to represent is, that they have become bankrupt and have obtained their certificates since putting in their answer to the original bill; and that although the plaintiffs are entitled to revive the suit, yet they cannot have a decree against the defendants in the same form as they might have had if there had been no such bankruptcies and certificates. It appears too, from the Office copy of the bill, that the subpoena which it prays for is one

Mode of shewing Cause against Revivor.

which requires the defendants to answer the bill of revivor, as well as to shew cause, if they can, why the suit should not be revived. These defendants, by their answer, do represent what they had a right to represent; namely, that the plaintiffs cannot have a decree made against them in the same form as it might have been made at the time when they put in their answers to the original bill. And though it is true that the objection might have been stated at the bar at the hearing; yet I think that it is by no means incumbent on defendants who are called on to answer a bill of revivor, to omit any facts which materially concern the decree. In my opinion, the defendants to such a bill, in case they are required to answer it, have the same right as all other defendants have; that is, to state in their answer such facts as are favourable to them as shewing that the same decree as might have been originally made cannot be obtained against them, notwithstanding those facts do not tend to shew that the plaintiffs are not entitled to revive the suit (*o*).” This case however is said (*p*) to have been subsequently overruled by Lord Cottenham.

An objection to a bill of revivor, as being in fact a bill of revivor and supplement, is waived by answering the supplemental part (*q*).

Exceptions to answer to bill of revivor.

Although an answer to a bill of revivor is liable to exceptions for impertinence and insufficiency, as much as an answer to an original bill, yet, says Lord Chief Baron Gilbert, “if an executor or administrator by his answer admits assets, and the plaintiff on the coming in of the answer, revives his suit, and proceeds in the original cause on the revivor, he shall never

(*o*) *Langley v. Fisher*, 1839, 10 Sim. 345.

(*p*) 6 Jurist, 1034.

(*q*) *Nanney v. Totty*, 1822, 11 Price, 117.

afterwards refer the answer for insufficiency; for this he ought to have done at first, and before he proceeded to revive the original cause; his doing whereof is an admission that the answer was full and perfect; or otherwise he might have excepted thereto, and had the opinion of the Court thereon; but then he could not have proceeded to revive till he had got over that point (r).”

Mode of shewing Cause against Revivor.

When the bill of revivor calls for an answer to the original bill, as well as for an answer to itself, the usual practice is to include the answer to the original bill and the answer to the bill of revivor in the same answer. The answer is then intituled as the answer to both bills (s). It appears however that the answers may be separated if the defendant prefers it (t).

When bill of revivor calls for answer to original bill.

The process for enforcing an answer to a bill of revivor requiring an answer, is the same as that which is in use with respect to original bills.

Process.

If, as we shall see is sometimes the case, it becomes necessary to bring the bill of revivor to a hearing, a replication is necessary, as in the case of an original bill and answer. If the bill of revivor is filed *before* decree, or *before* issue joined in the original suit, a separate replication is not necessary, but the revived suit and the original suit may be set down under one certificate. But if the bill of revivor is filed *after* decree, or *after* issue joined in the original suit, a separate replication must be filed, and subpœnas to rejoin served, after which the proceedings will be the same as on the original bill (u).

Replication.

A simple bill of revivor, as it requires no answer, of course requires no hearing. But if the bill of revivor

(r) For. Rom. 180.

(t) *Sayle v. Graham*, 183i, 5

(s) *Vigers v. Audley*, 1838, 9 Sim. 8.

(u) *Wade* 1 Smith's Ch. Pr. 523.

Sim. 408.

Mode of shewing Cause
against Revivor.

calls for an answer as to assets, and assets are not admitted, the suit must be set down to be heard in order to obtain a decree for an account. It has been said too (x) that if, in any case, an answer is put in to a bill of revivor, which controverts the title to revive or anything put in issue by the bill of revivor, it must be set down for hearing notwithstanding the order for revivor has been or may be obtained on motion in the meantime. The case of *Harris v. Pollard* (y) is quoted in support of this assertion, but it is submitted that that case does not decide that an objection, by answer, to the revivor of the suit necessitates the setting down of the bill of revivor for hearing, but merely that such an objection may be made by answer, and may be insisted on when the original suit (after having been duly revived by the order for revivor, which issues notwithstanding the objection by the answer) comes on for hearing in the regular way.

If however the objection to the revivor is taken by plea or demurrer, the bill of revivor must be brought to a hearing for the sake of disposing of such plea or demurrer; and if upon argument the plea or demurrer is allowed, the order for revivor, if already obtained, will, as we have seen, lose its effect, and the revivor will fall to the ground; and if the plea or demurrer is disallowed, the suit will be ordered to stand revived without a new subpoena (z).

If the bill of revivor is filed *before* decree, and requires to be heard, the revivor suit may, if the original suit has not been set down for hearing, be set down together with it; but if the original suit has been

(x) 3 Dan. Ch. Pr. 222; Seton, 385.

(y) 1734, 3 P. W. 348.

(z) Vide *Huggins v. York Buildings Co.*, 1740, Barnard, 83.

already set down, the revivor suit must be set down separately ; and in respect of all fees and charges will be considered as a separate suit until decree (*a*). But if the bill of revivor is filed *after* decree and requires to be heard, it must of course be set down by itself, unless the suit is to come on for hearing on further directions, in which case the revived suit may be set down so as to come on with it (*b*).

Mode of shew-
ing Cause
against Re-
vivor.

Of course a bill of revivor and supplement must be set down to be heard. And it must be set down against the party to the revivor part of it, as well as against the party to the supplemental part of it, although, if there had been no supplemental part, it need not have been set down against the former party (*c*).

If it is necessary to set the bill of revivor down for hearing, it appears that subpoenas to hear judgment in respect of the bill of revivor must be served independently of the subpoenas to hear judgment in the original suit (*d*).

(*a*) 1 Smith's Ch. Pr. 523.

Jurist, 314.

(*b*) 3 Dan. Ch. Pr. 223.

(*d*) *Vide* 1 Smith's Ch. Pr. 403.

(*c*) *Lake v. Austwick*, 1840, 4

CHAPTER VIII.

OF REVIVOR BY SUPPLEMENTAL SUIT AND DECREE.

Nature of
the Process.

WE have seen that when the new party claims through the act of the former party, as in the case of a death accompanied by a devise, he cannot be simply put in the place of his predecessor, as where the right devolves by operation of law, from the want of immediate privity between the late and the present owner. There is first a connecting link to be supplied between them, and this is matter which may be litigated in the Court of Chancery. Now a simple bill of revivor is clearly inadequate for this purpose, which cannot be determined without a *hearing*. Neither can it be effected by a bill of revivor and supplement, because in such a bill the supplemental matter must not concern the title to revive, but only contemporaneous circumstances. It is necessary to file a bill by which the right to revive may be put in issue, supported by proof and established by a *decree*.

There are two sorts of bills by which this may be done, according as the party whose interest has ceased to be represented was a sole plaintiff, or a defendant or co-plaintiff.

I. Where a
sole Plaintiff
devises.

I. Where the party dying is a sole plaintiff, the suit can only be revived by a new original bill, the necessity for which is clearly shewn in the following dicta; “The reasons why regularly the devisee of a sole plaintiff cannot bring a bill of revivor, are, first, because a suit hath been looked upon as a chose in ac-

tion, and consequently not assignable for fear of maintenance. Secondly, and which seems the better reason, because where a plaintiff devises his interest and dies, if the devisee were to bring a bill of revivor against the defendant, the heir or executor would be pretermitted, who might have a right to contest such disposition; and therefore he must bring his original bill and make the heir or executor a party (a)."

I. Where a sole Plaintiff devises.

The new party, then, if he wish to revive the suit, must file an original bill, putting in issue *de novo* all the facts stated in the original bill, and then shewing his succession to the interest of the former party, and, as in the case of a simple bill of revivor, praying revivor of the suit; which revivor will however be granted, not on a mere order, but on a decree to be made on the new matter.

Original bill in the nature of a bill of revivor.

Such a bill is in form as much an original bill as any other original bill, and, until it has proceeded to a decree reviving the former suit, is in fact the commencement of a new suit. But as its object and effect are to revive the former suit by the decree, it is said to be *in the nature of a bill of revivor*, and is virtually a continuation of the former suit.

It is in fact an original bill so far only as it supplies the want of privity, and in all other respects is the same as a bill of revivor (b). When once the validity of the alleged transmission of interest is established, the new party will have the same advantage of the proceedings on the original bill, as if there had been a privity of interest by operation of law between him and the original party: the defendants cannot make a new defence (c), and the suit is considered as pending from the filing of the original bill, so as to save the

(a) 1 E. Ca. Ab. 2.

Vern. 548.

(b) *Clare v. Wordall*, 1706, 2

(c) *Ibid.*

I. Where a
sole Plaintiff
devises.

statute of limitations(*d*), and so as to have the advantage of compelling the defendant to answer before an answer can be compelled to the defendant's cross bill, if he has filed one(*e*). If a decree has been made in the original suit, the devisee of the plaintiff has the same advantage of it as an heir or executor, without entering into the merits of the cause, and the decree on the new bill is the same as the first decree, neither longer nor shorter(*f*).

There is a case of *Johnson v. Northey*(*g*) which seems to militate against the doctrine that a decree obtained by a deviser enures to the benefit of his devisee and cannot be controverted. In that case a decree by default had set aside a settlement of 1638 under which Lady Lovelace claimed, and had established a subsequent settlement of 1684 on Lady Philadelphia Wentworth and her heirs, and was signed and enrolled. Afterwards Lady Lovelace died, and Lady Philadelphia devised the estate to Northey and other trustees for the payment of her debts and legacies, and a bill was filed by the creditors and legatees against Northey the surviving trustee, and against Sir Henry and Lady Johnson, the latter of whom was the heiress of Lady Lovelace, to have the benefit of the decree, and to have the debts and legacies paid, and another bill was also filed by Sir Henry and Lady Johnson to set aside the settlement of 1684. It was held, on the causes coming on to be heard together, that the creditors' bill being to obtain the benefit of the decree, had opened the decree, and that Sir Henry and Lady Johnson might controvert the matter over again. It must be observed, however, first, that the

(*d*) *Child v. Frederick*, 1714, 1 P. W. 266.

(*e*) Ld. Red. ed. 4, p. 93.

(*f*) *Clare v. Wordall*, *ubi supra*.
(*g*) 1700, Pr. Ch. 134.

decree was obtained on default, and secondly that the bill in the second suit was filed, not by the devisee, but by his *cestui que trusts* against him, and that they had apparently no reason for making Sir Henry Johnson and his wife parties, except for the purpose of bringing again into question the very point which had been decided.

I. Where a sole Plaintiff devises.

As to the form of the original bill in the nature of a bill of revivor, it must not only state the fact of the filing of the original bill, but must also repeat the facts stated in that original bill. This is usually done by stating that the original bill so stated them, and averring that it stated them truly; but perhaps the better way is to state the facts of the case as independent statements, and then to proceed to state that an original bill was filed making such statements; by which means the pleader avoids the complication of the statements within statements which must occur in the former way.

Form of the bill.

It will at first sight appear strange that the facts of the original case must thus be repeated *de novo*, seeing that it has been already said that the defendant is bound by all the proceedings in the original suit, and cannot make a new defence against the devisee, nor dispute the decree if any has been made. It would seem as if, under these circumstances, the truth or falsehood of the case made by the original bill were immaterial, and that all that need be averred in the reviving bill is the institution, right or wrong, of the original suit, its abatement, and the title of the new plaintiff to revive. And this reasoning would be true in the case of an heir, executor, or administrator, who takes by operation of law, and on whom therefore the right devolves of supporting the claims of the testator or intestate, as mere claims, without reference to their

I. Where a
sole Plaintiff
devises.

validity; and accordingly a simple bill of revivor never avers the truth of the facts stated in the original bill. But, as has been already shewn from the passage in the Equity Cases Abridged (*h*), a mere claim is not regarded as a subject for assignment, either *inter vivos*, or by will; and therefore a plaintiff, who stated merely that his testator was prosecuting a claim, and had devised to him the benefit of that claim, would shew a bad title on the face of his bill, and lay that bill open to a demurrer. He must allege and shew that his testator had a valid claim, which by means of the devise would have devolved on him, although there had been no suit pending, and then he will be in a situation to ask for the benefit of the suit which the testator had commenced for enforcing that claim, but which had been interrupted by his death. And though these averments, like all other statements in a bill, require to be admitted or proved, yet they need no fresh admissions or proofs, but may be sustained on the answers put in, or the evidence entered into, or the decree orders or reports made, in the original suit.

For this purpose the bill in question must proceed to state all the proceedings which have been had in the original suit, including the decree, if one has been pronounced. It must then state the abatement and the manner in which the property has become vested in the new party. It must charge that the new party is entitled to revive the suit, and call for an answer in the usual way. It must then pray that the suit may be revived, and if there has been a decree, that the plaintiff may have the benefit of it, or that the same decree may be made in his favour (*i*).

(*h*) 1 E. Ca. Ab. 2.

(*i*) *Vide Clare v. Wordall*, 1706, p. 73. For a precedent of such a bill, see the Appendix, No. XI.

2 Vern. 548; and Ld. Red. ed. 4,

All the original defendants will be necessary parties to the new bill, being all equally interested in the change of a sole plaintiff. The heir at law of the devisor must also be made a party defendant, in order that he may have an opportunity of questioning the validity of the devise, if he thinks proper (*k*). I. Where a sole Plaintiff devises.
 Parties.

It has been already stated, that although the new party is obliged to put the whole case in issue afresh in order to make out his title to relief, yet the defendants cannot contravene this case further than they have already done by their answers to the original bill. They ought therefore, in their answer to the reviving bill, merely to refer to their former answer so far as regards the original statements; but as to the additional matter they are at full liberty to put in such answer as they may be advised. Defence.

If the answers do not admit the plaintiff's title to revive, he must reply and enter into evidence to prove the facts subsequent to the abatement; and after publication passed he must set down the revivor suit for hearing. Subsequent proceedings.

Until the decree for revivor has been pronounced, the revivor suit is a distinct suit from the original or abated suit, and up to that decree is conducted in the same manner as any other original suit.

II. When the devisor is a defendant.—The same rules which apply in favour of the new party, being a plaintiff, apply against him when he is a defendant. He is bound by his predecessor's defence, when he succeeds to a defendant's interest, as much as he takes advantage of his predecessor's proceedings, when he succeeds to a plaintiff's interest; and if a decree has been made in the cause, the devisee of a defendant II. Where a Defendant devises.

(*k*) 1 E. Ca. Ab. 2.

II. Where a Defendant devises.

Supplemental bill in nature of bill of revivor.

cannot question that decree, for otherwise he would be in a better condition than the heir, whereas the *hæres natus* is favoured rather than the *hæres factus* (*l*).

The original plaintiff therefore in this case files a bill referring to the original bill, but without putting the facts of the case in issue (*m*), there being no necessity for his filing an original bill, because he has already made out his title to relief against the new defendant's predecessor, and can therefore continue the suit from the point where it abated. But he must put in issue the defendant's succession to the interest; and, as in the last case, pray for revivor of the suit, which revivor will be granted, not on mere order, because there is new matter to be litigated, but by a decree upon the supplemental matter.

Such a bill is in fact a supplemental bill, but, from its praying revivor, it is called a supplemental bill in the nature of a bill of revivor (*n*).

Lord Redesdale says (*o*), "If the death of a *party* whose interest is not determined by his death, is attended with such a transmission of his interest, that the title to it, as well as the person entitled, may be litigated in the Court of Chancery, as in the case of a devise of real estate, the suit is not permitted to be continued by bill of revivor. An original bill, upon which the title may be litigated, must be filed, &c." It is evident however that his Lordship is here speaking only of a *party plaintiff*, for in a former pas-

(*l*) *Minshull v. Mohun*, 1711, 2 Vern. 672.

(*m*) In *Woods v. Woods*, 1839, 10 Sim. 197, a plaintiff filed a bill, purporting to be a supplemental bill in nature of a bill of revivor, against a defendant's devisees, in which he put the original facts in issue; *i. e.* he stated them as state-

ments of the original bill, and also alleged the truth of such statements. With deference, it is submitted that this was unnecessary, if not wrong. He did not however interrogate to them, but merely asked whether the bill did not so state them.

(*n*) 3 Atk. 217.

(*o*) Ld. Red. ed. 4, p. 71.

sage (*p*), when speaking of the interest of a defendant becoming vested in another person, "as in the case of alienation by deed or devise," his Lordship says, that "the defect may be supplied by supplemental bill, whether the suit is become defective merely or abated as well as defective;" and he adds, "in all these cases, if the suit has become abated as well as defective, the bill is commonly termed a supplemental bill in the nature of a bill of revivor, as it has the effect of a bill of revivor in continuing the suit." It need hardly be added that a supplemental bill in the nature of a bill of revivor is very different from a bill of revivor and supplement, although His Lordship says (*q*) that this latter sort of bill may be necessary in case of "a devise under certain circumstances." The latter bill, however, is, as we have before stated, merely the union of two bills, *viz.* a bill of revivor and a supplemental bill, and is used where there is defect independently of the abatement, and which cannot be cured by mere revivor, while the former sort is used where the abatement and defect together form one chain of events to be brought before the Court.

11. Where a Defendant devises.

If a defendant devises his interest and dies before he has appeared to the original bill, the suit having, as we have before observed, never existed as against him, cannot be said to have abated by his death, and therefore cannot be revived against his devisee. The imperfection has been inherent in the suit from the beginning, and the case therefore falls within the description of imperfections mentioned in the second chapter of this treatise, and is remedied in the manner there pointed out.

Where a defendant devises before appearance to original bill.

The supplemental bill in the nature of a bill of

Form of the bill.

(*p*) Ld. Red. cd. 4, p. 68.

(*q*) Ibid. p. 70.

II. Where a
Defendant
devises.

revivor must state the filing of the original bill, and it appears that it must also state so much of the contents thereof as will be necessary to make an intelligible story in the new bill. It may sometimes be necessary for this purpose to state nearly the whole of the contents of the original bill. Thus in *Woods v. Woods* (*r*), Sir Lancelot Shadwell, V. C., allowed the repetition, in a supplemental bill in the nature of a bill of revivor, of nearly all the statements in the original bill, saying that the story could not have been made intelligible without them. The plaintiff however ought not to aver the truth of the original statements, because, as Master Dowdeswell said in the above case, this has the effect of putting those statements in issue.

In general the rules as to this point are the same as those already given in the second chapter of this treatise, as to the species of supplemental bills treated of in that place.

The bill in question must then state the proceedings which have been had in the cause, down to the time of the abatement. It must state the abatement and the transmission of interest to the new defendant. It must charge that the plaintiff is entitled to revive the abated suit against the new defendant, and call for an answer in the usual way; and if the original defendant died before answering the original bill, the new bill must also call upon the new defendant to answer the original bill. It must then pray for a revivor of the original suit (*s*).

Amendment of
the original
case.

If a plaintiff wishes to *amend* his case after the defendant has died and devised his interest, it is said that he cannot amend his original bill, but must insert such amended statements in his supplemental bill in nature

(*r*) 1839, 10 Sim. 197.

(*s*) For a precedent of this sort of bill, see the Appendix, No. XII.

of a bill of revivor. Thus in *Woods v. Woods*(*t*), where the plaintiff filed a supplemental bill in the nature of a bill of revivor against the devisee of a defendant, and in it stated several passages from the defendant's answer, and founded charges upon them, it was held that these statements and charges were not impertinent, because he might certainly have made them as against the original defendant by amendment of the original bill; and as the devisees are not called upon to answer the original bill, and have no office copies of it, there is no other way of amending as against them than by introducing the amendments into the supplemental bill. In this case it is apprehended that the new bill ought to be filed against all the defendants against whom the original bill would have been amended.

II. Where a Defendant devises.

With regard to the parties to the bill in question, all the plaintiffs, if there were more than one, must for the same reasons as were given in the case of a simple bill of revivor, be made parties to a supplemental bill in the nature of a bill of revivor, either as co-plaintiffs or as defendants; but of the defendants, only the devisee of the original defendant need be made a party to the new bill, the other defendants not being affected by the abatement and devise (*u*).

Parties.

The heir at law of the devisor must also be brought before the Court by the new bill, in order that he may have an opportunity of disputing the validity of the devise (*x*).

Until the decree for revivor(*y*) has been pronounced, the supplemental suit is a distinct suit from the abated suit, and will be conducted in the same way as any other suit.

(*t*) 1839, 10 Sim. 197.

(*u*) 3 Atk. 217.

(*x*) 1 E. Ca. Ab. 2.

(*y*) For the form of a decree for revivor, see the Appendix, No. XIII.

III. Where a
Co-Plaintiff
devises.

III. If the devisor was a co-plaintiff, the remaining co-plaintiffs either join with the devisee in reviving the suit, or bring him before the Court as a defendant. In the first case, it is apprehended, they must all join in bringing an original bill in the nature of a bill of revivor, as in the case of a sole plaintiff; in the latter case the surviving co-plaintiffs proceed as if the devisor had been a defendant.

Where one of two plaintiffs devised to his co-plaintiff, and also made him executor, the latter was ordered to bring a bill of revivor as executor, and also an original bill in the nature of a bill of revivor as devisee (z). As however an executor may, as we have before seen, bring a new original bill instead of a bill of revivor, if he prefers it, it is apprehended that the original bill in the nature of a bill of revivor would have been sufficient to advance his claim in both capacities, although the simple bill of revivor would not have done so except in his capacity of executor.

IV. Where the
Devise is after
Decree.

IV. We have already seen that after a decree in a suit all parties, both plaintiffs and defendants, are considered in the light of plaintiffs. If therefore the abatement, accompanied by the devise, takes place after decree, and a *defendant* wishes to revive the suit against the devisee, which we have seen he may do after decree, it is apprehended that he must, like any other plaintiff, bring the devisee before the Court by a bill continuing the suit from the abatement, and not putting the case in issue over again; in other words, by a supplemental bill in the nature of a bill of revivor; and that he must make all the parties to the decree parties to his bill.

(z) *Huet v. Say and Sele*, 1725, 2 E. Ca. Ab. 3; Sel. Ca. Ch. 53.

CHAPTER IX.

OF THE REVIVED SUIT.

THE abated suit having been revived either by an *Order* obtained on a simple bill of revivor, as in the case of the interest devolving on the heir or executor, or by a *Decree* obtained in a supplemental suit, as where the interest has devolved on a devisee, we will now proceed to inquire what effects the Revivor produces upon the original suit and the proceedings which have been had in it.

Effects of
Revivor on
the Original
Suit.

After this we will consider what further proceedings may be taken in the suit after it has been revived, and in what manner and under what conditions they must be taken.

I. As a general rule the revivor of a suit has the effect of reviving all the proceedings in that suit, and placing them in the same plight and condition as they were in before the abatement (*a*).

I. On existing
proceedings.

Thus we have seen that where a limited time was allowed for proceeding in a suit, such time ceased to run upon an abatement occurring. Upon revivor of the suit, however, the time will begin to run again, as from the period when the abatement occurred.

On a limited
time allowed
for any thing.

Where therefore a defendant had obtained orders for time to answer, and one of the plaintiffs died, and

(*a*) Where, however, the abatement arose from the marriage of an executrix who had been a party to an order by consent, the revivor was held, on demurrer, not to re-
vive that order, because the consent had determined by the marriage. *Hampden v. Brewer*, 1666, 1 C. C. 77.

Effects of
Revivor on
the Original
Suit.

the suit was revived, and the defendant applied in the revived suit for new orders for time, Lord Eldon said ; “ It would be very extraordinary, where process against the defendant up to the very point of custody remained upon the record, that the consequence of the death of one plaintiff, the suit not abating as to the other, should be that the defendants, though the same identical persons, are to have all the orders for time they originally had ; and that even the survivor [*i. e.* the surviving plaintiff] cannot have the process of the Court until all the same course of time has run out. The practice cannot possibly be that where the defendant has had all the time to which he was entitled, and has got into contempt, the death of one plaintiff purges the contempt as to all the other plaintiffs, and gives a right to all the orders for time again (*b*).” It is apprehended that nearly the same reasoning would apply to the case of abatement by the death of a sole plaintiff; for no abatement can be a good reason for giving a defendant more time to answer (to say nothing of the extra time during which the abatement lasted) than he was thought entitled to before.

If the defendant’s time for answering the original bill has expired before the abatement, the revivor does not give him any fresh power of making a defence to the original bill (*c*).

On process of
contempt.

Where process of contempt, to an order for a Serjeant at Arms, has issued before the abatement, it will abate with the suit. If however the abatement has occurred by the death of the *plaintiff*, the process will be revived with the revivor of the suit ; and a receiver may be appointed in the revived cause on the order

(*b*) *Fallowes v. Williamson*, 1805,
11 Ves. 306, 312.

(*c*) *Wakelyn v. Wathill*, 1679,
Dick. 13.

for a serjeant at arms in the original cause (*d*). And it is apprehended that, in analogy with the cases of sequestrators and receivers appointed on process, next considered, the process, although it ought to cease immediately upon the abatement occurring, will nevertheless be kept on foot, and that a reasonable time will be allowed to the representative to revive the suit, and thereby save the process from extinction. But it is apprehended that, in analogy with the same cases, if it is the *defendant*, against whom the process has issued, who dies, the process will not be revived against his executor, with the revivor of the suit.

Effects of
Revivor on
the Original
Suit.

A sequestration against a defendant, whether it be a sequestration upon mesne process, or a sequestration to compel performance of a decree, abates, like other proceedings, with the abatement of the suit; and this equally whether the abatement be caused by the death of the party issuing the sequestration, or the party against whom it is issued. If it is the party *issuing it* who has died, the sequestration is revived with the revivor of the suit (*e*); and the Court will not, immediately upon the abatement, turn the sequestrators out of possession, but will allow a reasonable time for the suit to be revived, and the sequestration thereby continued (*f*).

On sequestration.

But if it is the party *against whom* the sequestration has issued, who has died, then the rule seems to be different as to sequestrations *upon mesne process*, from what it is as to sequestrations *to compel performance of decrees*. In the former case the process, being personal, dies with the party against whom it

(*d*) *Ball v. Going*, 1826, 1 Hogan, 1 Ves. sen. 180.
396.

(*e*) *Hyde v. Forster*, 1748, Dick. 2 Ves. sen. 461.
132; *Wharam v. Broughton*, 1748,

(*f*) *White v. Hayward*, 1752.

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has issued, and cannot be revived (*g*); but in the latter case the sequestration will be revived with the revivor of the suit and of the decree (*h*). If the decree was for a personal demand, the decree, and consequently the sequestration, can only be revived against the personal representative (*i*); even though the decree were on behalf of a Charity (*k*); but if the decree was for a demand affecting the real estate of the deceased party, the decree, and consequently the sequestration, must be revived against the heir as well as the personal representative (*l*); unless indeed the real estate has gone over to some party claiming by a title independent of the deceased defendant, in which case it will of course be discharged from the sequestration (*m*).

In Gilbert's *Forum Romanum* it is said that "if the decree be upon a covenant which binds the heir, and the defendant dies, such decree may be revived, &c., and that when you have revived against the heir and executor, you may also revive the sequestration *upon motion*, if upon coming into Court, they can shew no cause why the decree should not be revived (*n*).” From this it would appear that when the defendant in contempt dies, the plaintiff must not only revive the suit, but also obtain an order on motion to revive the sequestration. It appears however from the words (*o*) of Lord Hardwicke in *Wharam v. Broughton*, that no

(*g*) *Burdett v. Rockley*, 1682, 1 Vern. 58; *Hawkins v. Crook*, 1747, 3 Atk. 594.

(*h*) The same cases, and *Bligh v. Darnley*, 1731, 2 P. W. 621; *Hyde v. Greenhill*, 1746, Dick. 106; and *Wharam v. Broughton*, 1748, 1 Ves. sen. 180.

(*i*) The same cases.

(*k*) *Univ. Coll. v. Foxcroft*, 1682, 2 C. R. 244; *sed vide Witham v.*

Bland, 1675, 3 Swan. 276; *Caermarthen v. Hawson*, 1731, 3 Swan. 294.

(*l*) *Derby v. Ancram*, no date, cited 2 C. C. 46; *Burdett v. Rockley*, *ubi supra*; *Hyde v. Greenhill*, *ubi supra*.

(*m*) *Atholl v. Derby*, 1672, 1 C. C. 220.

(*n*) *For. Rom.* 86.

(*o*) 1 Ves. sen. 185.

such step is necessary; but that the mere revivor of the suit against the heir and executor will be sufficient to revive the sequestration for enforcing the decree.

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Suit.

A receiver appointed upon process against a defendant will be dismissed upon an abatement. If, however, the abatement is caused by the death of a *plaintiff*, the receiver will not be dismissed immediately, but a reasonable time will be allowed for reviving the suit and thereby reviving the receivership. But if the abatement is caused by the death of the *defendant*, the receiver will be dismissed at once, because a subsequent revivor against the defendant's representative would not have the effect of reviving the receivership (*p*).

On a receivership appointed on process.

When subpoenas to hear judgment have been served, and the suit abates, the subpoenas will also abate. If however the suit abates by the death of a *plaintiff*, the defendants remaining the same, the original subpoenas will be revived with the revivor of the suit (*q*). But if the suit abates by the death of a *defendant*, the subpoena served on that defendant will not be revived with the revivor of the suit (*r*), but a new subpoena must be served on his representative. The subpoenas served on the other defendants, however, will of course be good (*s*), the suit having never abated as to them.

On subpoenas to hear judgment.

When an appeal abates in the House of Lords, the order for revivor is obtained as of course, and a fresh summons is unnecessary (*t*).

We have seen that an injunction, not being a perpetual injunction, granted before abatement, will naturally drop upon the abatement taking place. It

On injunctions.

(*p*) *Woods v. Creaghe*, 1824, 1 18; Reg. Lib. A. 1830, fol. 3; *sed* Hogan, 171. *vide* a doubt in *Byne v. Potter*,

(*q*) *Bray v. Woodran*, 1821, 6 1800, 5 Ves. 305.

Madd. 72. (*s*) 1 Smith, Ch. Pr. 403.

(*r*) *Cockburn v. Raphael*, 4 Sim. (*t*) *Byne v. Potter*, *ubi supra*.

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will however be revived with the revivor of the suit; and where the abatement is caused by the death of a sole plaintiff, the Court will, before it permits the injunction to drop, give the representatives of the deceased plaintiff notice that the injunction will be dissolved unless the suit is revived in a given time (*u*).

On a defence
already put in.

In general the representative of a deceased defendant is bound by the defence put in by such deceased person to the original bill, the effect of the revivor of the suit being to revive that defence also; but there is an exception to this rule in the case of a defendant having put in a *plea* to the original bill and dying before the plea is argued. In a case where this occurred, and, after the suit had been revived, the plea came on to be argued, the Court refused to hear it and ordered the representative to plead *de novo* (*x*).

The reason given for this in the note to the above case is that "the representative may have a plea to defend him without denying the merits of the case. For if an executor or administrator can truly plead *plenè administravit* on a *scire facias* at law (which must always issue in such case) the execution can only be *de bonis testatoris quando acciderint*. But the *answer* of a testator in a Court of Equity will bind an executor who has assets."

If however the plea has been argued and overruled before the abatement, the new defendant cannot, after revivor, plead the same plea over again (*y*).

On an appeal.

If an appeal is pending in the House of Lords, and the House reserves judgment on a certain point until an account is taken, and after the account is taken,

(*u*) *Stuart v. Ancell*, 1787, 1 Cox, 411, where the time given is said to be a week generally; *vide etiam*, 1 Hare, 622.

(*x*) *Micklethwaite v. Calverley*, 1735, Ca. temp. Talbot, 3.

(*y*) *Samuda v. Furtado*, 1790, 3 Bro. C. C. 70.

but before the appeal is brought on again, the suit abates, a revivor of the suit below will have the effect of reviving the appeal also (z). Effects of Revivor on the Original Suit.

As to the costs of that part of the suit which took place before the abatement, it appears that when the decree gives the costs *against* the representative of the deceased party, he is liable to the costs of the deceased party as well as to his own costs; but that when the decree gives the costs *in favour* of the representative of the deceased party, he is entitled to the costs of such proceedings only as have been had since the revivor. On costs of the original suit.

Thus in *Troward v. Bingham* (a) Sir Lancelot Shadwell, V. C., said, "that if the executor of a deceased plaintiff did not adopt the original suit, he was not liable to the costs thereof;" thereby, it is apprehended, implying, that were he to adopt his testator's suit, he would be liable to the costs thereof.

But where a plaintiff revived a suit against the heir of a deceased defendant, and the bill was afterwards dismissed with costs, it was held that the heir should not have the costs of his father before the revivor, because they died with the person (b).

It is true that in another case (c), where a female plaintiff married *pendente lite*, and the husband and wife revived, and obtained a decree with costs, they were held entitled to the costs of *the whole suit*, (excepting only the bill of revivor), and not costs from the revivor only. But the reason of this discrepancy appears to be, that in the case of abatement by *death*

(z) *Lake v. Mason*, 1746, 5 Bro. P. C. 278, 280.

(a) 1831, 4 Sim. 483. Where, however, a plaintiff gave notice of a motion, and died before it was made, and his executors revived, the Court refused to give the defendants the costs as of a motion

abandoned. *Warner v. Armstrong*, 1831, 4 Sim. 140; *Lewis v. Armstrong*, 1834, 3 Myl. & K. 69.

(b) *Lloyd v. Powis*, 1671, Dick. 16.

(c) *Durbanie v. Knight*, 1685, 1 Vern. 318.

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the party causing the abatement was no longer before the Court, but that in the case of abatement by *marriage* such party continued to be a party to the suit notwithstanding the abatement.

And where a plaintiff had obtained orders for costs against the receiver in the cause, and died, and the suit was revived by a creditor against the executor of the plaintiff, it was held that the executor was entitled to the costs, the reason given being that the receiver was an officer of the Court. In this case, too, it must be observed that the orders for costs had been made before the plaintiff's death (*d*).

The general rules, however, above given as to the costs do not apply to the case of an abatement occurring after the decree giving the costs has been pronounced. In such case the fate of the costs having been decided before the abatement, cannot be altered by the abatement; and accordingly we have already seen that if it becomes necessary to revive any material part of the decree, that part of it which gave the costs will be revived with the rest of it.

On proceedings
erroneously
had after the
abatement
but before
the revivor.

Sometimes proceedings are inadvertently taken after an abatement, before the plaintiff becomes aware of the abatement. As the effect of an order or decree for revivor is merely to put the suit in the same condition as it was in at the time of the abatement, it is obvious that the plaintiff does not obtain by such order or decree the benefit of the proceedings taken subsequently to the abatement. It is conceived that in this case he ought, in his new bill, to state the proceedings subsequent to the abatement, as supplemental matter, and pray, besides revivor, that he may have the same benefit of those proceedings as he would have had if

the suit had been previously revived. And if the defendant consents, or perhaps without consent if it seems reasonable, it is presumed that a decree to that effect will be made.

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Suit.

II. We will now consider the further proceedings in the revived suit.

II. On further
proceedings.

Where the abatement is caused by the death of a sole plaintiff, and his representative becomes the new plaintiff, he may take the same proceedings in the cause as the original plaintiff might have done. Thus the new plaintiff may amend the original bill; and in a case where the new plaintiff did so, he was held entitled to issue an attachment against the defendant for not answering the amended bill (*e*). Where however it is a *defendant* who has died, it appears that the original plaintiff must, if he wishes to amend, bring forward his amended statements in the new bill and not in the original bill, because the new defendant has no copy of the original bill (*f*); and in this case it is apprehended that he must make all the original defendants parties to the new bill.

Amendment.

After revivor, if evidence is gone into with respect to the revived suit, it appears that the plaintiff's interrogatories ought strictly to be intituled in both suits, namely, the original suit and the suit for revivor. But it seems to be not absolutely irregular to intitule them in the revived suit; that is, in the suit, such as it stands after the abatement and revivor have taken place.

Interroga-
tories.

Thus where a bill was filed by a plaintiff, Jones, against two defendants, Smith and Turner, and on Smith's death the suit was revived against Smith the younger, and a commission issued for the examination

(*e*) *Philips v. Darbie*, 1745, (f) *Vide Woods v. Woods*, 1839, Dick. 98; Ld. Red. ed. 4, p. 78. 10 Sim. 197.

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of witnesses, intituled “in a cause wherein Hugh Jones is plaintiff, and Thomas Assheton Smith (since deceased) and William Turner are defendants, by original bill, and wherein the said Hugh Jones is plaintiff, and Thomas Assheton Smith the younger is defendant, by bill of revivor;” and the plaintiff’s interrogatories were intituled “in a cause wherein Hugh Jones is plaintiff, and Thomas Assheton Smith and William Turner are defendants,” Sir J. L. Knight Bruce, V. C., refused a motion to suppress those depositions for irregularity on the ground of their differing in title from the commission, observing that there was no substantial difference between the titles, and no substantial inaccuracy in the latter title;—that the original and revived suit constituted but one and the same cause, although there were two bills in the cause; and that if the *cause is single*, it cannot be necessary to mention the *plurality of the bills* in the title to the interrogatories. His Honor however added that he was not entirely free from doubt on the point, and intimated that the case might be different if the abatement had occurred by the death of a plaintiff or the marriage of a female plaintiff (especially if on the death of a plaintiff his interest had severed and vested in other persons,) or if the abatement had occurred after a decree in the suit (*g*).

If the interrogatories are exhibited by defendants to the original bill who are no parties to the revivor suit, they may be intituled in the original cause only. If however such defendants have joined with the new defendants in the commission to examine witnesses, or have consented to the order for such commission, the interrogatories and depositions must be intituled in

(*g*) *Jones v. Smith*, 1842, 6 Jurist, 1078.

both suits, following the title of the commission, or they will be suppressed (*h*). Effects of Revivor on the Original Suit.

If the interrogatories are exhibited by the new defendant alone, it is apprehended that they ought to be intitled in both suits.

Where in the title of the interrogatories a bill, which was in fact a bill of revivor only, was called a supplemental bill, the plaintiff was held not entitled to read the depositions taken under such interrogatories; but he was not ordered to pay the costs of such depositions until it should appear whether use could be made of them in taking the account before the Master (*i*).

The revived suit will be carried on to a decree and subsequent proceedings, in the same manner as any suit which has not abated. Decree, &c.

Where a suit is revived after decree, if the revived suit is not proceeded with by the party reviving, any other party, who might have prosecuted the decree if no abatement had occurred, is at liberty to proceed with it upon the revivor obtained by the former party (*k*). Any party may prosecute the revived suit after decree.

It has been said, however, that if the abatement happens after a decree which contains some specific direction, (as that the defendant shall pay a certain sum of money,) but before that specific direction has been complied with, such decree cannot be carried into effect by the mere order to revive, but the revived suit must be set down for hearing in order to have a fresh decree respecting such matter as is left unperformed (*l*). It is apprehended however that this is not the practice in the Court of Chancery, although it may have been so in the Court of Exchequer. *Quære* whether the revived suit must be set down for hearing, because a specific direction in the original decree has not been complied with:

(*h*) *Pritchard v. Foulkes*, 1839, 2 Beav. 133. (*k*) *Burney v. Morgan*, 1823, 1 S. & S. 358.

(*i*) *Onge v. Truelock*, 1828, 2 Moll. 31, 38. (*l*) *Harries v. Johnson*, 1839, 3 Y. & Coll. Ex. Eq. 583.

CHAPTER X.

OF THE CESSATION OF INTEREST UPON THE DEATH
OF A PARTY.

Death of a
Corporation
Sole.

It has been stated that where a party dies, and his interest in the subject matter of the suit does not survive his death, but the property, instead of devolving on a person claiming under him, goes over to a stranger claiming by an independent or collateral title, the imperfection which has taken place in the suit is irremediable. For there is no privity between the person who lately represented the interest in question, and the person who now represents it, so as either to entitle the latter to the benefits, or to render him justly subject to the liabilities, of the original suit. The suit therefore, strictly speaking, is absolutely terminated with respect to the deceased party, and can no longer be proceeded with.

Such is the case of a Rector, Bishop, or other Corporation sole, suing or sued in respect of his preferment, and dying while the suit is pending;—the only redress which can be had by or against the new rector or bishop, must be obtained by filing an entirely new bill and commencing *de novo*.

Original bill
in the nature
of a supple-
mental bill.

As, however, in consequence of the interests represented by the old and new parties being the same, the proceedings in the new suit will necessarily be more or less identical with those which have already taken place in the former suit, and it is desirable to save the expense and delay of repeating them, the plaintiff may,

if he pleases, instead of making the new bill wholly original, notice the former suit, and pray that his bill may be taken as supplemental to the first bill, and that he may have the benefit of the proceedings in the former suit. A bill filed with this object is called an original bill in the nature of a supplemental bill.

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The bill in question being filed for the purpose of putting in issue, not only the fact of the filing of the original bill, but also the statements in that original bill, ought properly to repeat those statements, though it more usually evades this by setting out the original bill at length, and averring that the contents of it are true. The Courts however seem sometimes to have been content with even less than this, and to have permitted the original facts to be put in issue in a very questionable manner, and even to have dispensed with their being put in issue at all, thus allowing a supplemental proceeding to have the effect of an original one for this purpose.

Form of the
bill.

Thus in *The Attorney-General v. Foster (a)*, where a supplemental information was filed against parties, against whom it was held that an original information in the nature of a supplemental information ought to have been filed; that is, against whom the case ought to have been put in issue over again; Sir James Wigram, V. C., held that the case was sufficiently put in issue by the supplemental information to enable the new parties to enter into the merits of the original case. In this case the supplemental information merely stated *the filing* of "an original information, stating and charging as therein was stated and charged, and praying &c.," setting forth the whole prayer. Although this was allowed to have the effect of an original information in the nature of a supplemental

(a) 1842, 6 Jurist, 1032; *vide etiam* S. C. 2 Hare, 81.

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information, yet it appears that His Honor made that decision unwillingly, and not without great doubts. It is apprehended that the legitimate course would have been to put the whole case in issue against the new parties, *de novo*, at least by averring that the statements and charges were true, if not by setting them out at length besides, as independent statements.

After stating the former case and the filing of the original bill, the new bill must relate the proceedings which have been had in the original suit, and the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has gone over to the successor. The new matter, however, must not be stated "by way of supplement," because the new bill is not a supplemental bill, but a new original bill. It must then shew the ground upon which the Court ought to grant the benefit of the former suit to or against the successor (*b*); and it must call upon the defendant for an answer in the usual way.

The prayer must be for a decree adapted to the case made by the new bill, and also, as we have said, that the new bill may be considered and taken as supplemental to the first bill (*c*).

Benefit of former proceedings.

To such a bill, says Lord Redesdale (*d*), "a new defence may be made, the pleadings and depositions [in the former cause] cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the Court to make a similar decree." In another passage (*e*) His Lordship says that "in general by an original bill in the nature

(*b*) Ld. Red. ed. 4, p. 99.

(*c*) For a precedent of such a bill, see the Appendix, No. XIV.

(*d*) Ld. Red. ed. 4, p. 73.

(*e*) Ibid. p. 72.

of a supplemental bill the benefit of the former proceedings can be obtained." Upon these passages Lord Eldon makes the following remarks: "With respect to the [last quoted] passage, in which it is supposed there is some obscurity, I may say, upon the authority of Lord Redesdale himself, that it is not very easy to be removed, nor capable of being removed by stating any judgment authorising that passage. The proposition that *in general* by an original bill in the nature of a supplemental bill the benefit of the former proceedings may be obtained, is properly so restrained." Again;—"In the distinction stated between an original bill in the nature of a bill of revivor and an original bill in the nature of a supplemental bill, Lord Redesdale does not say that in the latter the pleadings and depositions in the first cause cannot be used; but that they cannot be used *in the same manner*; and the difficulty arises upon the negative proposition, without explaining what is the precise idea that belongs to it. These passages do not determine the sense of the words *the proceedings upon the former bill*. You must endeavour to determine to what stage the cause must have gone, to entitle you to say there are proceedings the advantage of which the second bill may draw to itself, as Lord Redesdale expresses it. But the proposition so put comprehends every stage of the cause, as furnishing the question, between the answer and the final decree obtained and executed; and a general doctrine of this sort does not enable you to say what the Court is to do in every intermediate case between the first and the last stages of the cause, where the interest of the plaintiff or defendant is absolutely gone (*f*)."
 Mr. Daniell however suggests that there is no obscurity in Lord Redesdale's passages; that the confusion has

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arisen from erroneously considering the bill in question more in the light of a supplemental bill than of an original bill; that Lord Redesdale's meaning is, "that if you wish to use the pleadings and depositions in the first cause as evidence in the second cause, you must obtain an order (*g*) to do so, as in the ordinary case of reading the pleadings and depositions in one suit, in another; and that when they are tendered as evidence, their admissibility will depend upon the same rules with regard to privity &c. as have been already (*h*) pointed out with regard to the admissibility of the pleadings and evidence in one cause, in another where the suits are distinct;" and that the effect stated by Lord Redesdale as to the decree in the first cause "is precisely the effect which a decree in one original cause would have *in pari materiâ* in another cause; whereas the effect of a decree in a suit purely supplemental would be to bind those parties who are affected by it by means of their privity of interest (*i*)."

Parties.

As to the parties to the new bill;—if the deceased rector or bishop was a sole plaintiff, of course the same persons will be defendants to the new bill filed by his successor, as were defendants to the original bill. If the deceased party was a co-plaintiff, or a defendant, the original plaintiffs will bring his successor before the Court by the new bill, as a defendant, and the question as to what original parties must be parties to the new bill, will, it is apprehended, be decided by the same rules as have been already given with respect to the bills treated of in the second chapter (*k*).

(*g*) But in *Uppohn v. Uppohn*, same parties.
1841, 4 Beav. 246, the benefit of the former proceedings was given by a *decree*, and not by an *order on petition*. Vide Appendix, No. XV. The *order* seems to be only where the two suits are between the

(*h*) 2 Dan. Ch. Pr. 427.

(*i*) 3 Dan. Ch. Pr. 190, 191.

(*k*) Vide Ld. Red. ed. 4, p. 72; where it is said that the bill, as to the other parties, and the rest of the suit, is *supplemental* merely.

We must here notice some exceptions to the above rule, in which, although the interest of the party dying dies with him, and another party not claiming under him is put into his place, yet the Court permits the original suit to be continued. This occurs where the deceased party has been suing or sued *in autre droit*. Where, for instance, a party suing or defending in the character of a personal representative dies, and his personal representative is not the personal representative of the original testator, but an administrator *de bonis non* is appointed, such administrator *de bonis non* does not claim his interest in the matter *under* the testator's first personal representative, but by a title independent of him, and therefore according to the above doctrine the suit ought to be irremediably gone, as in the case of the rector or bishop. But inasmuch as the beneficial interest remains unaltered by the death, and the rights and liabilities attached to such interest remain the same, the new administrator is allowed to be put in the place of the former personal representative, as much as if he were the executor of such first representative, and the representation had descended lineally to him. Such administrator *de bonis non*, therefore, proceeds or is proceeded against in the suit by simple bill of revivor (*l*), the suit being supposed to have become abated.

Exceptions
to the Rule.
Administrator
de bonis non.

In the above case of *Owen v. Curzon*, the reason given is, that by the statute 17 C. 2, c. 8, an administrator *de bonis non* may revive a judgment obtained by the first administrator, and that by analogy a Court of Equity follows the same rule in respect of a decree; which seems to imply that the rule only ap-

(*l*) *Owen v. Curzon*, 1691, 2 Vern. 237, Raithby's ed. The note, however, says that the demurrer in this case was allowed; which, on searching the Registrar's Book, appears to have been the case. *Vide* Reg. Lib. 1691, B. fol. 76.

Exceptions
to the Rule.

plies to cases where a decree has been obtained. But the case of *Huggins v. The York Buildings Company* (*m*) seems to extend the rule to all cases, whether a decree has been obtained or not.

Executor
acting by
mistake.

The rule seems to be the same where a person has acted as executor under a mistake, and the true executor succeeds him in the administration of the estate. Thus where a party filed a bill as executor under a will, and obtained a decree, and a subsequent will was discovered appointing another party executor, who also claimed as a devisee under such subsequent will; and the latter party filed an original bill in the nature of a bill of revivor to have the benefit of the former decree; Lord Manners, C., said, "As a decree on the wrongful executor's bill in favour of the defendants would have availed them against the present plaintiff as far as he was executor, to the same extent, on the other hand, he must be entitled to revive." His Lordship, however, allowed that there was no privity between the false and the true executor as to what the latter sought as *devisee*, and dismissed the rest of the bill (*n*).

Committee of
lunatic.

Where the committee of a lunatic dies, and a new committee is appointed, such new committee claims independently of the first committee. Nevertheless the parties are not put to the trouble of an original bill, but it appears that in the case of a *plaintiff*, the first committee's suit may be continued by the new committee, by merely putting in issue his succession to the first committee's situation, by supplemental bill (*o*); and in the case of a *defendant*, an order will be made on motion that the new committee be named as such in all future proceedings (*p*).

(*m*) 1740, 2 E. Ca. Ab. 3.

(*o*) 1 Dan. Ch. Pr. 116.

(*n*) *Gough v. Latouche*, 1819,
2 Moll. 406. *Sed vide* 2 Bli. 566.

(*p*) *Lyon v. Mercer*, 1823, 1
S. & S. 356.

Where a *feme covert* sues by her next friend in respect of her separate property, and he dies, it appears that she may nominate a new next friend without filing any new bill. In *Barlee v. Barlee* (q) it was ordered that the *feme covert* should name a new next friend within two months, or that the bill should be dismissed with costs to be paid out of the fund in Court.

Exceptions
to the Rule.
Next friend.

Where the assignees of a bankrupt or insolvent debtor die pending a suit, and new assignees are appointed, such new assignees claim independently of the former assignees. Yet it is not necessary for a new suit to be commenced by or against such new assignees. If they are plaintiffs, no fresh bill of any sort is wanted, but it is only necessary to substitute their names for the names of the former assignees in the subsequent proceedings (r); whilst, if they are defendants, a new bill indeed is required, but only a supplemental bill, putting in issue their appointment in the place of the former assignees (s).

Assignees of
bankrupt or
insolvent
debtor.

In this place may be noticed the peculiar case of a *sole plaintiff* instituting a suit on behalf of himself and the rest of a *class of persons*, as creditors or legatees, and on his death after decree his representative declining to proceed in it. In this case it is almost a matter of course to permit another person, reported by the

Sole plaintiff
in a creditors'
suit where his
representative
declines to
proceed with it
on his death.

(q) 1822, 1 S. & S. 100. Vide etiam *Askew v. Peddle*, 1838, 2 Jurist, 884; where the next friend of infant plaintiffs died.

(r) 6 G. 4, c. 16, s. 67, and 7 G. 4, c. 57, s. 26. It has been decided that these Acts apply only to the case of assignees *plaintiffs*, and not of assignees *defendants*. *Bainbridge v. Blair*, 1832, Young Ex. Eq. 386, overruling *Gilchrist v. Renten*, 1832, *ibid.* 387, n. See

also *Mendham v. Robinson*, 1833, 1 Myl. & K. 217.

(s) Vide *Anon.* 1739, 1 Atk. 88. In this case, which was previous to the above Acts of Parliament, the assignees were *plaintiffs*. But it is apprehended that if the assignees were allowed to proceed by supplemental bill only, as *plaintiffs*, *à fortiori* they might have been proceeded against as *defendants*, by that method.

Exceptions
to the Rule.

Master to be one of that class, to take up the proceedings (*t*); and it appears that although the new plaintiff was not even a party to the former bill,—much less a successor to the former plaintiff's interest,—he still need not commence *de novo* by original bill according to the general rule above given, but need only put in issue the supplemental matter shewing that he is one of the class in question. “In this case,” says Sir John Leach, V.C., “the plaintiffs having been permitted to file the supplemental bill on behalf of themselves and all other persons of the same class, appear to me to be necessarily entitled to the same decree to have the benefit of the proceedings in the suit, as the representatives of the original plaintiff would have been entitled to, if they had proceeded by bill of revivor.”

It must be observed however that “as the representative of the deceased creditor has an interest in the prosecution of the suit, in respect of the costs already incurred in it, no other creditor can file the supplemental bill without notice to such representative. The proper course is for the creditor desiring to prosecute the suit to move for liberty to file a supplemental bill if the representative of the deceased plaintiff do not revive within a limited time, and to serve such order on the representative (*u*);” and also, it appears, on the defendants (*x*). And if any party wishes to make any objection to such process, it appears that he must do so by opposing the motion, and not by answer, plea, or demurrer, to the supplemental bill (*y*).

After a creditor has been admitted by order to come

(*t*) *Houlditch v. Donegall*, 1823, 1 S. & S. 491. (*x*) *Houlditch v. Donegall*, *ubi supra*.
 (*u*) *Dixon v. Wyatt*, 1819, 4 Madd. 392. (*y*) *Ibid*.

in before the Master, and prove his debt and pay his contribution, it appears that he is entitled to *revive* the suit if it abates (*z*), on the principle, it is apprehended, that he has thereby become a party to, and an actor in, the suit. And, after decree, the present practice of the Court is to allow any creditor to prosecute the decree by *petition* merely. But this does not render the supplemental bill above-mentioned irregular, if the creditor prefers it (*a*).

Exceptions
to the Rule.

In this place may be also mentioned the case of a reference to the Master to approve of a settlement on a wife and her children. In this case if the wife dies before the Master has made his report, the children, although not previously parties to the suit, have, it appears, a right to continue the wife's suit by supplemental bill, instead of being driven to commence *de novo* by an original bill in the nature of a supplemental bill (*b*).

Wife and children after reference to the Master to approve of a settlement.

Similar to the case of the death of a corporation sole is the death of a tenant for life to whom no arrears are due. There is however this difference between the cases, that in the former the successor is to be brought before the Court by a new process, having been previously unascertained, whilst in the latter the remainder-man is already before the Court, having in general been a necessary party to the suit from the beginning.

Death of a Tenant for Life.

Except therefore in the case of his being a sole plaintiff or sole defendant,—(in the former of which cases the remainder-man wishing to prosecute the same matter may obtain the benefit of the proceed-

(*z*) *Pitt v. Richmond's Creditors*, 1702, 1 E. Ca. Ab. 3. *Vide* Ld. 1 Sim. 5.
Red. ed. 4, p. 79, and *Finch v. Winchelsea*, 1727, 1 E. Ca. Ab. 2.
(*a*) *Davies v. Williams*, 1826, 10 Ves. 84.
(*b*) *Murray v. Elibank*, 1804,

Death of a
Tenant for
Life.

ings (c) in the same way as a successor on the death of a corporation sole who was a sole plaintiff, and in the latter of which cases the suit is extinguished for want of fuel, the *causa litigandi* being gone,)—the death of the tenant for life will cause no interruption whatever to the suit, which will proceed as before with respect to the other parties as if such deceased party had never existed, and without any new step being necessary in consequence of such death. For as the remaining parties have still amongst them the whole interest in the matter litigated, as with the deceased party they had before, and are still competent to call upon the Court for a decree, the fact of the loss of interest of the deceased party is not a material fact necessary to be brought before the Court. The same may be said of the death of a co-trustee, co-executor, or other joint tenant (d), unless such party was a defendant personally liable to the plaintiff's demand.

The bill must
shew that the
interest was
determinable.

It appears, however, that in order to enable the other parties to proceed with the suit as before, on the death (whether a legal or a natural one) taking place, it is necessary that the original bill should have shewn that the interest in question was determinable upon such death; otherwise the suit will be consi-

(c) *Osborne v. Usher*, 1721, 6 Bro. P. C. Toml. 20. It appears that on the death of a sole plaintiff whose interest determines with his death, a defendant may, before decree, in some cases obtain the benefit of the proceedings by an original bill in the nature of a supplemental bill; this bill being in fact the commencement of a new suit, and not a continuation of the former suit. *Vide Upjohn v. Upjohn*, 1811, 4 Beav. 246; where a defendant obtained by such a bill, called by mistake in the report a

supplemental bill, the benefit of certain preliminary inquiries under the Ninth Order of May, 1839. For the form of the decree in this cause, see the Appendix, No. XV.

(d) *Vide Fallows v. Williamson*, 1805, 11 Ves. 306, 309; *Boddy v. Kent*, 1816, 1 Mer. 361, 364. Of course this does not apply to the death of a tenant in common, such persons having interests perfectly distinct from one another, except in the case of a tenant in common for life. *Vide Askew v. Peddle*, 1838, 2 Jurist, 884.

dered to have merely abated, and not wholly terminated, with respect to the deceased party, and consequently to stand in need of revivor. Thus where a testator appointed his widow and a person of the name of Hampden his executors, and declared that the widow's executorship should cease on her second marriage, and the widow and Hampden filed a bill respecting the property, but not stating that the widow's executorship was conditional, and afterwards the widow married, it was held that Hampden could not proceed with the suit without bringing the widow's second husband before the Court by a bill of revivor (e).

Death of a
Tenant for
Life.

We may here mention the peculiar case of a *tenant in tail* dying without issue, and the property going over to a tenant in tail in remainder. If in this case the Court adhered to its usual rule of requiring all persons interested to be parties to the suit, the remainderman in tail would have been a party in the lifetime of the first tenant in tail, and the case would exactly resemble that already stated of a tenant for life dying. In consequence however of the anomalous practice of dispensing with the presence of any person interested in remainder after the first tenant in tail (f), on the ground that such tenant in tail, having the power of acquiring the fee simple, may properly be considered as representing the whole inheritance, the death of the first tenant in tail without issue, and without having acquired the fee simple, leaves the suit in a condition rather resembling that occasioned by the death of a bishop or rector already noticed.

Death of a
First Tenant in
Tail without
Issue.

Whichever resemblance may be considered the closest, it would seem to follow that the death of a

(e) *Hampden v. Brewer*, 1666, 1 Ch. Ca. 77. (f) *Lloyd v. Jones*, 1803, 9 Ves. 37, 55.

Death of a
First Tenant in
Tail without
Issue.

tenant in tail without issue, being a sole plaintiff or sole defendant, wholly determined the suit, and that the benefit of it could only be obtained by or against the next remainder-man by an original bill in the nature of a supplemental bill ; for such, we have seen, is the case both on the death of a tenant for life, being a sole plaintiff, and on that of a bishop or rector. But the analogy does not hold ; for, as a consequence of the arbitrary rule already noticed, which treats a tenant in tail as representing the whole inheritance, a Court of Equity considers a remainder-man in tail as in some degree succeeding to the interest of his predecessor, and therefore allows the suit to be continued by or against him by *supplemental* bill.

This at least is true as regards the death of a tenant in tail without issue, being a *defendant*. In the above case of *Lloyd v. Johnes* (g) Lord Eldon says, “ If the bill claims a charge upon the whole inheritance, and created by the author of all the gifts, comprising the inheritance, an estate for life with remainders to the first and other sons in tail ; and the first tenant in tail in being is made a party, and he dies without issue ; according to the constant practice all the proceedings are had against the second son, as if he had been originally a party ; and (if I am not misled by the authority of Lord Redesdale, provoked, I may say, to accuracy upon this subject) those proceedings would be carried on by a bill, not stating the facts in the original bill, but stating that the original bill had represented the facts as there represented ; and practice will sanction the declaration that this form would sustain the suit against the second son, as a due mode of putting in issue the facts that had been put in issue against the eldest.”

(g) 1803, 9 Ves. 37, 58.

And it appears to be generally considered in the Books of Practice that the rule is the same where the tenant in tail who dies was a *plaintiff*, and that his remainder-man in tail may continue the suit by supplemental bill. In the last work on this subject it is said (*h*), “The rule which requires a bill in the nature of a supplemental bill, and not a mere supplemental bill, to be filed in a case where the interest of a sole plaintiff is determined and transmitted to another *pendente lite*, applies only to cases in which the party has become entitled to the interest of the original plaintiff by a separate independent title: it does not apply where the new party comes in by the same title as the original plaintiff, as in the case of a tenant in tail succeeding to a title to sue in equity upon the death of a preceding tenant in tail, in which case he may proceed by supplemental bill by way of continuation of the original suit: nor does it appear to make any difference, provided he comes in under the same title, that he comes in by force of a new limitation in remainder, upon the determination of a preceding estate tail: he will in such case be entitled to continue the suit in the same manner as a tenant in tail coming in by succession as issue in tail (*i*).” For this the above mentioned case of *Lloyd v. Johnes* is cited as an authority; and it appears, upon the whole, that it bears out the proposition; but the judgment of Lord Eldon is more remarkable for its depth than for its clearness, and there are some passages in it which appear to militate against the decision to which he ultimately comes, or the inference which is commonly drawn from that decision.

Death of a
First Tenant in
Tail without
Issue.

(*h*) 3 Dan. Ch. Pr. 165.

(*i*) But *quære* whether an heir in tail would not bring a bill of re-

vivor: for he takes by *descent*, like any other heir, and not by *purchase*.

Death of a
First Tenant in
Tail without
Issue.

Case of Lloyd
v. Johnes.

The case of *Lloyd v. Johnes* was one in which a tenant in tail plaintiff died without issue, after the answers had come in and been replied to, but before any witnesses had been examined; and the tenant in tail in remainder filed a supplemental bill against the same defendants, to which they put in short answers referring to their former answers. The new plaintiff then entered into evidence as to the facts stated in the original bill. When the cause came on to be heard, the defendants objected to this evidence being read, on the ground that the facts which it proposed to establish had never been averred or put in issue by the new plaintiff's bill, that bill merely stating that another bill had been filed alleging those facts, which filing the defendants did not deny;—it did not call on the defendants to admit or deny the truth of the facts themselves, and therefore the defendants insisted that the plaintiff could not proceed to prove an issue which he had never tendered to them.

Consideration
of Lord Eldon's
judgment.

Lord Eldon decided that the facts were sufficiently put in issue, and therefore upheld the plaintiff's bill in that particular case: but whether he did so on the ground that a supplemental bill was the right proceeding, or on the ground that, although the supplemental bill was a wrong proceeding, yet the defendants had, by putting in their answers, waived any objection to it, is a point not easy to be ascertained.

In page 49, His Lordship intimates that "facts should never be put so in issue again, on account of the hazard attending it."

Again in page 53, His Lordship says, "The general question is, whether this bill can be taken to be a continuance of the suit; and the first consideration upon that is, whether Lewes's suit had gone in the course of proceedings to any such point that this

plaintiff, whose right was saved by accident, (but accident out of which title arises, not that sort upon which relief is given under the head of accident,) was to start from the conclusion of the former proceedings instead of beginning *de novo*; secondly, if he chose to do so instead of filing an original bill, in what manner he was to file his bill. He has taken a course the most difficult to sustain upon the forms of the Court; for unless with reference to some particular cases, there is not much in practice, and nothing is to be found in judgment, as authority for it; and therefore *I have considerable doubt in saying that the bill can be sustained in this form; but upon the whole I think it may.*" And a little further on—"It is to be observed that the question, where a tenant in tail succeeds another, arises much more frequently where the tenant in tail is a defendant, and not a plaintiff; and therefore all the *dicta* apply to the case that happens more frequently, and not to that which sometimes may happen; and there may be question whether the same principle, applying to the death of the tenant in tail *defendant*, applies to his death when *plaintiff* before the suit is determined."

Death of a
First Tenant in
Tail without
Issue.

The inference to be drawn from these passages seems to be that the bill ought to have been an original bill in the nature of a supplemental bill.

Again in page 61.—"The bill therefore may be sustained; and if it is familiar in pleading, as against a new tenant in tail coming in, to file a bill stating that you made such a representation in the former bill, instead of representing the facts in the second bill, that will do in this case against all the defendants, who made no objection, and who are adult and competent. There is no surprise in this instance. They have answered as if the facts were put in issue, and

Death of a
First Tenant in
Tail without
Issue.

there is no disadvantage to them from this mode of alleging the facts. If there were any surprise, in a case new of its kind, it would be better to give them the opportunity of putting in other answers; but as they have sustained no disadvantage, not having contended with other weapons than if one or two words more (*k*) were contained in the bill, this objection is not sufficient to repel the claim of the plaintiff." From this passage it would appear that Lord Eldon allowed the bill merely because the objection to its not putting the facts sufficiently in issue was taken too late. The defendants, he says, are adult and competent;—they make no objection;—they have answered as if the facts were put in issue;—they sustain no disadvantage. It must surely be inferred that if the defendants had been infants, or if, being adults, they had taken the objection earlier, His Lordship's decision would have been different.

This view of the subject is supported by the authority of Lord Redesdale, who says expressly that "if the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person not claiming under him, as in the case of an ecclesiastical person succeeding to a benefice, or a *remainder-man* in a settlement becoming entitled upon the death of a *prior tenant* under the same settlement, the suit cannot be continued by bill of revivor, nor can its defects be supplied by a supplemental bill. * * * But in general by an original bill in the nature of a supplemental bill the benefit of the former proceedings can be obtained (*l*)."

(*k*) "stating (*as the fact is*) see the note on this passage in 3
that &c."

Dan. Ch. Pr. 169.

(*l*) Ld. Red. ed. 4, p. 72. But

On the other hand there are other passages in Lord Eldon's judgment, which seem to shew that it is a natural and proper consequence of the rule of pleading which treats a tenant in tail as absolute owner, that the next tenant in tail should be considered as so far standing in his place as to be entitled to continue the suit by supplemental bill;—especially as it is admitted that this consequence follows where he is a *defendant*, and that he succeeds to all the disadvantages of a suit instituted against his predecessor.

Death of a
First Tenant in
Tail without
Issue.

It must be observed, however, that Lord Eldon, throughout his judgment, treats as distinct the two questions, first, whether the remainder-man is entitled to the benefit of the former proceedings; and secondly, if he is, whether he can obtain that benefit by continuing the existing suit, or must institute a new original suit which shall draw to it the benefit of the former one. The first question he clearly decides in the affirmative: "The justice of the Court furnishes this as a principle; that it is of absolute necessity, when once it is said that the tenant in tail shall represent the inheritance, that those who are entitled to the inheritance shall in this Court have the benefit, and the disadvantage, of a proceeding by him (*m*)."

His opinion on the second point is by no means so clear. In page 56 he says, "In this case I take the questions to be, first, whether anything passed in the former cause of which this plaintiff can have the benefit; secondly, if so, whether he has framed his bill in this cause in such a way, that he may have the same benefit as he could have had if his bill had been framed upon any other plan. In considering that, I must state it to be the case of a tenant in tail succeeding to a title to sue in equity upon the death of a preceding tenant in tail, and to sue in equity as a plaintiff claiming by force of

Death of a
First Tenant in
Tail without
Issue.

a new limitation and not by succession. I admit the difference; but I am not satisfied it is so considerable that if such a suit could be maintained by the issue in tail, upon the principles adopted by this Court for the convenience of justice it shall not be retained by the remainder-man." This seems to hold that the remainder-man is in the same situation as the issue, not only with respect to the right to benefit by the former proceedings, but also with respect to the frame of the suit by which that right is to be asserted. It also seems to hold that an heir in tail would proceed by a supplemental bill, and not by a common bill of revivor, though it is not easy to see the reason why.

Again, in page 60, after saying that depositions taken before an intermediate remainder-man comes into esse are good as against such remainder-man, he adds; "This sort of principle, arising out of what the Court does for the convenience of justice, must be applied both for and against the tenant in tail; subject always to this, that where the tenant in tail takes a different interest, or rather a similar interest not affected by the same circumstances, it is competent, both for and against him, to bring forward the equities belonging to those different circumstances, as contra-distinguishing his case; and that is the result of the passage in Lord Redesdale's book, which, so stated, I think right, that the difference between the issue in tail, heir, or devisee, and a remainder-man claiming by force of a new limitation, is, that in the latter case the party is not bound by the shape of the defence." Again;—"It follows therefore that if any advantage arises from the tenant in tail taking up the cause, he will have a right to say that his interest was represented; and he will continue it. It saves expense, and may be of advantage to both;—to the plaintiff, as giving him the benefit of

admission;—to the defendant, as giving him the advantage of any statement in the bill. If the plaintiff sues as by a continuation of the suit, there is no injustice in pressing against him the advantage of the statement in a bill which he adopts. But neither plaintiff nor defendant is shut out from stating particular circumstances attaching upon his case.” These passages seem to point at a supplemental bill, and to treat it as a proper proceeding.

Death of a First Tenant in Tail without Issue.

On the whole it is submitted that the inference to be drawn from *Lloyd v. Johnes* is, that, whether the tenant in tail who dies without issue be a plaintiff or a defendant, the suit may be *continued* by or against the second tenant in tail by *supplemental bill*; and that the examinations of witnesses, whether *de bene esse* or in chief, and all other proceedings by or against the first party, will be good in favour of or against the second party. The principle is similar to that which prevails in the case of new assignees of bankrupts. The new party does not claim under the old one; but there is such an identity of interest as authorises a continuation of the suit; subject however to this condition, that the new party has the advantage and the disadvantage of stating in his own favour, or of having stated against him, any special circumstances which may distinguish his case from that of the former party.

The second tenant in tail proceeds or is proceeded against by a simple supplemental bill.

So a remainder-man in tail may appeal from a decree against the first tenant in tail; and for this purpose he must make himself a party to the suit in the manner mentioned above, and pray for the benefit of the proceedings for the purpose of appealing (*n*).

And may appeal against the decree.

It need hardly be remarked that a suit instituted by or against a first tenant in tail can only be continued by or against the second tenant in tail when the *causa*

(*n*) *Gifford v. Hort*, 1804, 1 Sch. & Lefroy, 386.

Death of a
First Tenant in
Tail without
Issue.

litigandi is derived from the party *under whom they both claim*. If it is derived from some act of the first tenant in tail, the second tenant in tail, claiming by independent title, can never be incorporated into the suit by supplemental bill. "I distinguish," says Lord Eldon, "between cases where the suit is founded upon contract by the tenant in tail, and a suit to bind the land in respect of charges created by the author of the gift, and imposing them therefore upon all who take *per formam doni* (o)."

Death of a
Husband
Party in right
of his Wife.

In the case of the death of the husband of a *feme covert*, where the husband and wife were parties in her right, there is this peculiarity, that although his interest wholly determines with his death, yet his death has also the effect of emancipating his wife from his control, and giving her a new capacity of suing or being sued. If therefore such husband and wife were plaintiffs, and he dies, although the wife may go on with the suit as before without taking any new step (p), yet she is not bound to do so, and if she declines to prosecute it she is neither liable to the costs of it (q), nor bound by the former proceedings.

Where he is
a plaintiff.

Thus where a husband and wife filed a bill in right of the wife, and the defendants answered, and witnesses were examined, and publication passed, but the husband died before the hearing, and the wife married again, and the second husband and wife filed a new bill for the same matter, they were not restrained from examining witnesses examined in the former cause, because the wife was held not to be bound by the proceedings in the former cause (r).

If however the surviving wife *does* prosecute the

(o) 9 Ves. 57.

(j) *Lonon.*, 1750, 3 Atk. 726.

(q) *Ld. Red. ed.* 4, p. 59.

(r) *Anton.*, 1690, 2 Vern. 197.

suit, she is liable to the entire costs, and bound by the former proceedings (s). Death of a Husband Party in right of his Wife.

If the husband so dying is a *defendant*, a distinction is made between cases where the suit respects the wife's interest in the character of an *executrix* or *administratrix*, and cases where it respects her *inheritance*. In the former cases the wife is bound by the answer put in under the authority of her husband, and therefore his death causes no imperfection in the suit; but in the latter cases she is not bound by such answer, and consequently, as some new step must be taken in the cause by the plaintiff to enable her to put in a new answer, the husband's death causes an imperfection in the suit (t). The language of Mr. Daniell, however, and of Lord Chief Baron Gilbert seems to allow no such distinction, the former saying generally that the wife *is* bound by the answer, and the latter that she *is not* bound, but that a bill of revivor must be filed to enable her to put in a new answer (u). It is conceived that the apparent contradiction must be reconciled by the distinction above made.

In this latter case, *viz.* the husband being a defendant, if on the husband's death a *new interest* arises in the wife, of course she must have an opportunity given her of putting in a new defence in respect of such new interest. In this case therefore an imperfection arises in the suit, but this imperfection is not caused by the death of the husband, but rather by the new interest which accrues to the wife. Thus where a husband and wife were defendants as having *a term* vested in them in right of the wife, an administratrix, and on

(s) Ld. Red. ed. 4, p. 60.

(u) 3 Dan. Ch. Pr. 211; Gilb.

(t) *Shelberry v. Briggs*, 1691, 2 Vern. 249; *sed vide Eyton v. Eyton*, 1700, Prec. Ch. 116. For. Rom. 175; *vide etiam* Prac. Reg. 92, and Toth. 12.

Death of a
Husband
Party in right
of his Wife.

The death of
the *wife* causes
imperfection.

the husband's death she became entitled to *dower* out of the same property, a supplemental bill was held necessary (x).

If however it is *the wife* that dies, and her interest does not determine but goes over to her husband as her administrator, and not as her survivor, her death of course causes an imperfection, which must be remedied in the ordinary way. The remedy however is said to be only necessary in respect of estate, if any, which the husband becomes possessed of as such administrator, and not in respect of that which he became possessed of *jure mariti* (y).

Death of a
Relator or
Plaintiff in
Interpleader.

Where one of several relators in an Information dies, the suit may proceed without any new step being necessary. Where however there is only one relator, it is true that his death causes an imperfection in the suit, because there must be some party answerable for the costs in case of a decree against the complainants; but the imperfection is so slight as merely to have the effect of suspending the suit until a new relator has been appointed (z).

And in an interpleader suit, after the cause has been heard, and a trial at law has been directed to settle the right between the defendants, there is an end of the suit as to the plaintiff; so that if he afterwards dies, the cause proceeds as before, and there is no imperfection, each defendant being in the nature of a plaintiff (a).

(x) *Mole v. Smith*, 1820, 1 J. & W. 665. But see Jac. 495.

(z) Ld. Red. ed. 4, p. 100.

(a) *Anon.*, 1685, 1 Vern. 351;

(y) *Jackson v. Rawlins*, 1690, 2 Ld. Red. ed. 4, p. 60. Vern. 194.

CHAPTER XI.

OF ASSIGNMENT OF INTEREST.

WE now come to that part of our subject which regards imperfections arising from events which affect, Effects
of Assignment. not the existence of the person representing an interest, but the condition of the interest represented. These occur, as we have seen in the fourth chapter, where all the parties to the suit retain their existence, both natural and civil, but cease to represent among them all the interests necessary to be brought before the Court.

It has, in the same chapter, been stated that this may happen in three different ways:—first from the assignment, in fact or in law, of an existing interest, as where a party to the suit becomes bankrupt or insolvent, or sells or mortgages the property in question:—secondly, from the rise of a new interest, as where a child is born who is entitled under a will or settlement:—and thirdly, from the cessation of an interest during the life of the party enjoying it, as where a tenant's lease expires in his lifetime, or a rector resigns his living.

In all these cases it must be observed that, though *defect* arises, the suit becomes neither *abated* nor *extinct*. The old litigant parties are still living, and capable of interpleading, though they can no longer do so with effect until something wanting to the suit has been supplied. The suspension is only of the *utility* of the suit, and not of its *vitality*.

Effects
of Assignment.

We will first consider the defect arising from the Assignment of an existing interest.

The assignment of an existing interest *pendente lite* does not in all cases cause defect, because where the assignment is an assignment in deed, and not in law, and where it passes an equitable interest only, and not a legal estate, it has no validity except in a Court of Equity; and that Court, having the sole cognisance of it, will not allow it to have any effect to the prejudice of the suit. The assignee may indeed, as we shall presently see, intervene if he thinks proper; but, until he does so, it is open to the other parties to treat the assignment as wholly nugatory, and to consider the assignor as still the person representing the interest in question.

Thus where a co-plaintiff executed a deed of assignment, for the benefit of his creditors, of his *equitable* interest only in the subject matter, it was held that such an assignment *pendente lite* did not prevent the suit from being heard, but that it might be heard as if there had been no such assignment, and that those who claimed under it must take such course to enforce their rights as they might be advised (a).

But where the assignment *pendente lite* is an assignment in law, as a bankruptcy, or where it affects the legal estate in the premises, a Court of Equity must acknowledge that the assignor has lost his interest, or a part of it, as the case may be, and that the suit has become either closed or incomplete for want of parties. And this incompleteness exists equally, although the assignment has been made to a person who was already a party to the suit in some other capacity; because, although in that case the assignee is before the Court, yet he is so on a ground perfectly

(a) *Eades v. Harris*, 1842, 1 Y. & Coll. C. C. 230.

distinct from that which now renders him a necessary party.

Effects
of Assignment.

In these latter cases of assignment, therefore, the suit cannot proceed to any useful purpose until the defect occasioned has been supplied. And we have now to consider the proper mode of effecting this.

The remedy for a defect occasioned by the assignment of an interest varies according as the party who wishes to make the suit perfect is one of the original parties to the suit, or the assignee, who is a stranger to it: and it is proposed to consider our subject according as the assignment has the effect of putting an end to the suit, as a total assignment by a sole plaintiff; or of making it incomplete only, as a disputed or a partial assignment by a sole plaintiff, or an assignment by a co-plaintiff or defendant; and again, in the latter cases, according as the party conducting the suit takes notice of the assignment or leaves the assignee to his own remedies.

I. Where the assignment is such as to put an end to the whole suit, as a total assignment by a sole plaintiff.

I. Total Assignment by
Sole Plaintiff.

Where a sole plaintiff knowingly and intentionally assigns all his interest in the matter litigated, to another person, and has no fraudulent design of defeating or disputing his own act, or where an assignment in law takes place and the plaintiff does not dispute the legal effects of the event, it is obvious that the plaintiff has lost all motive for proceeding with the suit; and therefore, though neither abated nor extinct, yet, unless taken up by some other person, it is in effect finally closed. Before decree a defendant cannot make himself an acting party, and therefore the only person who can proceed with the suit is the assignee himself; and this he cannot do by a mere

I. Total Assignment by Sole Plaintiff.

Assignee files an original bill in the nature of a supplemental bill.

supplemental bill, but must file a new original bill, though in the nature of a supplemental one.

By this bill the assignee will put the whole case in issue, repeating the statements in the original bill, and then stating the filing of that bill, and the proceedings, and the assignment under which he claims: and he will charge that in consequence of such assignment he alone is entitled to the interest in question, and has a right to prosecute the matter; and he will pray that he may have the benefit of the former proceedings, and that for that purpose his bill may be taken as supplemental to the former bill. If any case for special relief arises out of the circumstances of the assignment, he will add a prayer for such special relief (*b*).

The reason why the original case must again be put in issue, has already been noticed as arising from the doctrine of maintenance. It is not enough for the new plaintiff to state that his assignor instituted a suit, and assigned to him the benefit of it; he must shew that his assignor had the property in respect of which the suit was instituted, and that that property has been assigned and carries with it the right to sue.

The proceedings upon the new bill, and the degree to which the new plaintiff will be allowed the benefit of the former suit, as well as the mode of availing himself of such benefit, will be the same as in the case of the original bill in the nature of a supplemental bill mentioned in the preceding chapter.

Motion by defendant to dismiss where sole plaintiff becomes bankrupt.

Although an original bill in the nature of a supplemental bill is, to use the language of Lord Redesdale (*c*), not a continuation of the former suit, but a new suit which draws to itself the advantages of the

(*b*) For a precedent of this sort of bill see the Appendix, No. XVI.

(*c*) Ld. Red. ed. 4, p. 99.

former suit, yet for some purposes it seems to be considered as a continuation only. Thus, if a sole plaintiff becomes bankrupt, and the regular time for dismissal for want of prosecution arrives, the defendant does not make the usual motion to dismiss for want of prosecution, but moves specially, upon notice, that the bill be dismissed *without costs* unless the assignees file a supplemental bill within a certain time (*d*). I. Total Assignment by Sole Plaintiff.

The reason for this special motion is thus given by Sir John Leach: "If when the plaintiff becomes bankrupt, it were permitted to the defendant to dismiss the bill for want of prosecution, it would necessarily subject the bankrupt to the payment of costs when he has no means, which is against the general rule of this Court as to bankrupts; and it might be attended with this further inconvenience, that the bill might be dismissed without the assignees knowing the fact that such a bill was filed, and without any opportunity of judging on their part whether it would or would not be beneficial to the bankrupt's estate that the suit should be prosecuted. An order that the bill should be dismissed without costs within a limited time, if the assignees do not think fit to file a supplemental bill, obviates both these objections, provided the notice of motion is served on the assignees (*e*).

It appears that the limited time allowed to the assignees ought to be at least as long as the time which the original plaintiff would have been allowed for prosecuting his own suit. "It is hardly reasonable," says

(*d*) *French v. Barber*, 1781, 3 Beav. 295, n.; *Porter v. Cox*, 1820, 5 Madd. 80; *Sharp v. Hullett*, 1826, 2 S. & S. 496; *Huntingtower v. Sherburne*, Rolls, Nov. 19, 1842. Where the Court had granted a month to the assignees to determine whether they would file a supplemental bill or not, it refused, under the circumstances, to extend the time. *Huntingtower v. Douglas*, 1842, 7 Jurist, 8.

(*e*) *Sharp v. Hullett*, *ubi supra*.

I. Total Assignment by Sole Plaintiff.

Sir John Leach, V. C., in the same case, "that a bill should be dismissed for want of prosecution as against assignees at an earlier period than it could, according to the course of the Court, have been dismissed for want of prosecution if the plaintiff had not become bankrupt. For that would be to deny to the assignees, who stand in the place of the bankrupt, the same time for being advised as to the propriety of continuing the suit, as was afforded to the bankrupt, although the assignees cannot equally be informed as to the subject of the suit."

By *supplemental bill* (the term used in the above cases) it is apprehended that *original bill in nature of a supplemental bill* must have been meant, because the assignees of a bankrupt sole plaintiff can file no other sort of bill (*f*). And, if so, it certainly seems *primâ facie* an anomaly to say that the dismissal of one suit shall depend upon the institution or non-institution of another suit. In these cases, however, says Sir James Wigram, V. C. (*g*), "when the Court makes an order that the bill be dismissed (but always without costs) unless the assignees file a supplemental bill within a limited time, the Court makes no order *against the assignees*. It merely gives the assignees the benefit of a notice that the bankrupt's defective suit will be dismissed *as against him* unless the assignees take proceedings to sustain the original suit. It is an indulgent act towards the assignees, &c. The language of Lord Eldon in *Randall v. Mumford* (*h*), shews that formerly the Court acted against the bankrupt only, in these cases, obliging him to procure his assignees to act, and to file a supplemental bill, at the peril of

(*f*) Ld. Red. ed. 4, p. 65.

(*g*) 1 Hare, 621, 622.

(*h*) 1811, 18 Ves. 424, 427.

having his bill dismissed if he failed to do so. *Wheeler v. Malins* (i) is to the same effect."

I. Total Assignment by Sole Plaintiff.

It must be observed however that the above-mentioned practice is not adopted in the case of the bankrupt being a *co-plaintiff*. In that case, as the other co-plaintiffs are capable of prosecuting the suit, if they please, the motion to dismiss for want of prosecution must be made in the ordinary way (k).

If the assignee brings his original bill in the nature of a supplemental bill after a decree has been made in the first suit, he cannot claim the benefit of that decree as a matter of course, for the laws of maintenance forbid the assignment of a decree as much as the assignment of any other right of litigation. "The decree," says Lord Redesdale, "is of no further use than as it may induce the Court to make a similar decree (l)." The benefit of the decree, therefore, if obtained at all, can only be obtained by a decree to that effect in the second suit (m). In this case the new bill is sometimes called a bill to carry a decree into execution (n). And it is strictly necessary that an assignee who brings his original bill in the nature of a supplemental bill to have the benefit of a former decree, should shew that that decree was a proper one; for the Court will not carry a former decree into execution, without first examining that decree, and satisfying

How far the benefit of a former decree can be obtained

The assignee must shew that the first decree was a proper one.

(i) 1818, 4 Madd. 171. *Vide etiam Bromley v. Gregory*, 1812, and *Mills v. Fry*, 1816, 3 Beav. 296, 297, n.

(k) *Caddick v. Masson*, 1827, 1 Sim. 501; *Latham v. Kenrick*, 1827, 1 Sim. 502; *Kilminster v. Pratt*, 1842, 1 Hare, 632; 6 Jurist, 1081.

(l) Ld. Red. ed. 4, p. 73.

(m) On one occasion, where money had been ordered by the former de-

creed to be paid to the plaintiff, and he became bankrupt, he and his assignees applied by *petition* to have it paid to the assignees; which was granted, the sum being very small. *Setcole v. Healy*, 1788, 2 Bro. C. C. 322.

(n) Ld. Red. ed. 4, p. 95; where he says, that a bill of this denomination may be filed by the assignee of a party to the decree.

I. Total Assignment by
Sole Plaintiff.

itself that it was a correct one ; and if it finds that any error exists in the decree, it will decline adopting it (*o*), and the assignee will be obliged to commence *de novo* and ask for a new decree.

If therefore the assignment should have taken place before the decree, the assignee can obtain no benefit from such decree, because it will be considered to have been an erroneous decree for want of a proper party to it, namely, the assignee. The latter must therefore not only make out an independent case for himself by his original bill in the nature of a supplemental bill, but also carry on his suit to an entirely new decree just as if no other decree had ever been made.

Thus in *Clunn v. Crofts* (*p*), a married woman filed a bill by her next friend, stating her title to a share of the personal property of an intestate, as one of his next of kin ; and also stating a separation deed which gave her power over such share, and praying the usual accounts of the intestate's estate. Afterwards she assigned the share which she expected to be decreed to her to trustees in trust for certain persons ; and yet proceeded with her suit notwithstanding, and obtained a decree in her favour. Afterwards the *cestui que trusts* filed a simple supplemental bill, praying that they might have the benefit of the decree as if they had been parties to the original suit, and for leave to prosecute it ; and on an objection being taken that the decree was erroneous for want of parties, and that therefore the new plaintiffs could not have the benefit of it, Sir John Leach, M. R., said ; “ The frame of the present bill is wrong, because it only recites the se-

(*o*) *Hamilton v. Houghton*, 1820, 2 Bli. 170 ; *vide etiam Johnson v. Northey*, 1700, Pr. Ch. 134 ; 2 Vern. 407 ; *Werden v. Gerard*, 1718, cited Ld. Red. ed. 4, p. 96, n. ; *Att. Gen. v. Day*, 1749, 1 Ves. sen. 218 ; and *West v. Skip*, 1749, 1 Ves. sen. 239. (*p*) 1834, 12 Law J. Ch. 112.

veral proceedings under the former bill, and does not prove the separation deed and other matters material to establish the plaintiffs' right to a decree. The bill should not have prayed the benefit of the former decree, but it should have prayed for a new decree. The supplemental bill should have gone into evidence, and should have made out the same case as was made out by the original bill. The decision of the House of Lords (*q*) is according to this principle. I can make a new decree to the same effect as the former decree on a proper case being made out, but not in a supplemental suit."

I. Total Assignment by Sole Plaintiff.

It need hardly be observed that it is only the defendant to the new bill, who can call in question the former decree; the party who seeks for the benefit of it cannot controvert any part of it. If the latter is dissatisfied with any part of the decree, he must impeach it by some other method (*r*).

In this place may be mentioned the case of a plaintiff becoming idiot or lunatic, and having a committee appointed. When this happens, it appears that the committee continues the suit in the joint names of himself and the idiot or lunatic, and adds himself to it by supplemental bill merely, without being necessitated to commence *de novo*. And the supplemental bill answers the same purpose as a bill of revivor in obtaining the benefit of the former proceedings (*s*).

Where a plaintiff becomes lunatic, idiot, or imbecile.

Where a plaintiff becomes imbecile during a suit, so that it is necessary to appoint a next friend to sue for him, it appears that the proceedings are not stayed on that account (*t*).

(*q*) *Hamilton v. Houghton*, 1820, 232. 2 Bli. 169.

(*s*) *Brown v. Clark*, 1787, 3

(*r*) *Shepherd v. Titley*, 1742, Woodeson's Lectures, 378, n.

2 Atk. 348; *vide etiam Robinson v. Robinson*, 1750, 2 Ves. sen. 225, Jac. 377.

(*t*) *Wartnaby v. Wartnaby*, 1821,

II. Where the Plaintiff adds the Assignee to the Suit.

Where the assignment is questionable.

II. We will now consider the cases where the assignment merely renders the suit incomplete for want of parties, and the party conducting the suit is desirous of remedying such defect.

It sometimes happens that either from the dishonesty of the assignor, or from its being really doubtful whether the transaction amounted to an assignment or not, the fact of assignment is a question in dispute between the assignor and assignee. Here, of course, the plaintiff has no intention of abandoning his suit; and he will, according as he thinks best, either continue the suit as if nothing had happened, treating the pretended assignment as a nullity, or else make the new claimant a party in respect of his claims. If he chooses to bring the pretended assignee before the Court, he must do so by that species of bill which we already know under the name of a supplemental bill; not restating his case *de novo*, because the assignee, if he be one, must of course take subject to all the litigation in which the interest he has acquired is involved; but merely mentioning the original bill and the proceedings under it, and then stating the event on which the assignee builds his claim, and the claim so founded upon it, and charging that such event did not amount to an assignment, and that the defendant has in fact no interest in the matter, but that on account of his claims he is a necessary party to the suit. To such a bill the pretended assignee will be the only necessary defendant, unless there is anything in the statements which affects the interests of the former defendants. And the proceedings on this bill will be similar to those already mentioned with regard to the supplemental bills which form the subject of the second chapter.

A plaintiff

Conformably to what has been said, a sole plaintiff

becoming bankrupt may himself proceed with his suit, if he disputes the validity of the commission; or if, while he allows the validity of the commission, his assignees do not think fit to prosecute the suit, and he conceives that it is for his advantage to prosecute it (*u*); under those circumstances however he must bring the assignees before the Court by supplemental bill, as in the former case the fact of his bankruptcy, though he may dispute the validity of it, is too notorious and material a fact to be passed over in silence; and in the latter case, any benefit which may be derived from the suit must be subject to the demands of the assignees (*x*). If however he is continuing the suit, as he may do, merely for his personal protection against a demand not proved under the commission, the assignees will not be necessary parties (*y*).

II. Where the Plaintiff adds the Assignee to the Suit.

becoming bankrupt may proceed with his own suit.

If a sole plaintiff makes a *partial* assignment only, such as a lease or a mortgage of the whole, or an absolute conveyance of a part, of the premises in question, this circumstance will not, as in the case of a total assignment, preclude the plaintiff from continuing his suit. He will still have a motive for proceeding; and if he does so, he ought to make his assignee a party to the suit. This he may do by filing a supplemental bill against him, as in the case already noticed of a person claiming under an alleged total assignment. He cannot, it is apprehended, make his assignee a co-plaintiff with himself, except by filing an original bill, for which expense there would be no motive.

Partial assignment by a sole plaintiff.

Where a *co-plaintiff* assigns *pendente lite*, the case is nearly similar to that of a sole plaintiff making a

Assignment by a co-plaintiff.

(*u*) *Lowndes v. Taylor*, 1816, 1 Madd. 423; *Semple v. L. & B. Railway Co.*, 1838, 9 Sim. 209.

(*x*) Ld. Rd. ed. 4, p. 67.

(*y*) Ibid.

II. Where the Plaintiff adds the Assignee to the Suit.

Assignment by a defendant.

partial assignment or an incumbrance; and it will be guided by the same rules, *mutatis mutandis*, as have been already given in respect of the latter case.

If a defendant makes an assignment or incumbrance, and the assignee or incumbrancer is to be brought before the Court, it is not necessary to commence *de novo* against him by original bill, because he claims under the original party. The plaintiff may continue his own suit against the new party by a bill referring to the original bill, and merely putting in issue the assignment or incumbrance; in other words, by a supplemental bill.

Where defendant becomes bankrupt, plaintiff may go in under the bankruptcy.

If a defendant becomes bankrupt *pendente lite*, the plaintiff need not go on with the suit by filing a supplemental bill against the assignees, but he may dismiss his bill and go in under the bankruptcy. It seems doubtful whether the bill will be dismissed in this case without costs. In the somewhat analogous case of *Knox v. Brown* (z), where the defendant yielded to the demands of the plaintiff after the bill was filed, Lord Thurlow permitted it, saying that it was by the act of the defendant himself that the object of the suit was gone; but in *Rutherford v. Miller* (a) and in *Monteith v. Taylor* (b) the Court refused to dismiss the bill without costs. If, however, the plaintiff prefers prosecuting the suit, the bankrupt defendant cannot compel him to bring his assignees before the Court in a given time. The bill can only be dismissed, if at all, in the ordinary way for want of prosecution (c).

Where defendant assigns before appearance.

If a defendant assigns his interest before *appearance* to the bill, it cannot be called an assignment *pendente lite*, because a suit does not exist against a party until

(z) 1787, 2 Bro. C. C. 186.

(a) 1794, 2 Anst. 458.

(b) 1804, 9 Ves. 615.

(c) *Manson v. Burton*, 1842, 1 Y. & Coll. C. C. 626.

he has entered an appearance. In this case, therefore, II. Where the Plaintiff adds the Assignee to the Suit. it is apprehended that such defendant must still appear and answer the bill, and that, upon his stating the assignment in his answer, the plaintiff must add the assignee to the suit by supplemental bill.

Where an information was filed against the trustees of a Charity, and some of them died, and new trustees were appointed and conveyances made to them by the surviving trustees before the hearing, and after the hearing and decree they were brought before the Court by a supplemental information praying the same relief against them as was prayed by the original information against their predecessors, they were held to be not in the same situation as purchasers *pendente lite*, but as claiming by independent title, and therefore not bound by the answers of the former trustees, although not entirely unaffected by them. In this case, therefore, it seems that the new trustees ought to have been brought by original information in the nature of a supplemental information, and not by a supplemental information merely (*d*).

It appears that one supplemental bill will not supply the defect in more than one suit. Thus where two suits were instituted for the administration of an estate, namely a legatees' suit and a creditors' suit, and one decree was taken by consent in both suits, and then both suits became defective, it was held that a separate supplemental bill must be filed in each suit, and that one order might then be made in both suits (*e*).

So where a vendor, Cattell, obtained a decree for specific performance of a contract for sale of an estate against the purchaser, Corral, who accordingly paid

(*d*) *Att. Gen. v. Foster*, 1842, 6 Jurist, 1032; *vide etiam S. C.* 13 Law J. 218.
2 Hare, 81.

Case of new trustees of a Charity appointed in the place of former trustees defendants.

One supplemental bill will not supply a defect in two suits.

II. Where the Plaintiff adds the Assignee to the Suit.

the purchase money into Court to the credit of the cause; and afterwards a second suit was instituted by Rowlatt against Cattell and Corral, making a claim to the purchase money; and Cattell having become insolvent and an assignee being appointed, Rowlatt brought the assignee before the Court by a supplemental bill to his own original bill; on a motion by Corral to have the purchase money refunded to him on Cattell's having refused to execute a proper conveyance tendered to him by Corral, Sir James Wigram, V. C., said; "The object of the motion is to deal with funds which stand to the credit of the cause in which Cattell is the plaintiff. There is at present no proceeding by any party in the suit instituted by Cattell, or by the assignee of Cattell, to remedy the defect occasioned by his insolvency. I am informed, and it is not in fact denied, that the title of Rowlatt is disputed; and I cannot therefore, before any decree is made in his cause establishing that title, consider or treat him as a person whose suit has remedied the defect in the cause of *Cattell v. Corral*, in which he is not a party. I must assume it to be possible that at the hearing of the causes in which Rowlatt is plaintiff his bills may be dismissed; and in that case the cause of *Cattell v. Corral* will remain defective, as it was before the supplemental bill of Rowlatt was filed, and as it still is (f)."

Form of the supplemental bill.

As to the form of the supplemental bill;—in this, as in other cases, it ought to state only so much of the former proceedings as is necessary to make an intelligible story and shew that the plaintiff has an equity. Thus in *Vigers v. Audley (g)*, where an injunction was granted against the directors of a Company, and after-

(f) *Cattell v. Corral*, 1841, (g) 1837, 9 Sim. 72.
1 Hare, 216.

wards a new director was appointed who attempted to infringe the injunction, and the plaintiff filed a supplemental bill against him, commencing his statements with the granting of the injunction, Sir L. Shadwell, V. C., held this statement to be quite sufficient, observing that "it is not necessary for a plaintiff, when he files a supplemental bill, to state in it all the circumstances of the case at length. All that is requisite is, that he should state so much of the case as shews that there was an equity; and as the plaintiffs in this case have stated that the Judges of the Court have granted injunctions in the prior stages of the cause, they have stated sufficient to shew that there was an equity."

II. Where the Plaintiff adds the Assignee to the Suit.

After stating the subsequent proceedings, and the assignment, the bill will pray for the same relief against the assignee, as might have been had against the assignor if he had not assigned (*h*).

The rule as to the parties to the supplemental bill seems to be the same as has been already given with respect to the other species of supplemental bills. All the original co-plaintiffs must be made parties, because no co-plaintiff ought to take any step in the suit without giving the others an opportunity of dissenting from it; and as to the original defendants, if the supplemental bill is filed to bring before the Court the assignee of a *co-plaintiff*, all the original defendants must be parties to it, but if it is to bring the assignee of a *defendant*, the original defendants seem not to be necessary parties.

Parties.

Thus where, in a suit against trustees and executors for an account, a co-plaintiff mortgaged his interest and became insolvent pending the suit, and a supplemental bill was filed by the other co-plaintiffs against the mortgagee and the provisional assignee alone, Lord

(*h*) For a precedent of this sort of bill, see the Appendix, No. XVII.

II. Where the Plaintiff adds the Assignee to the Suit.

Langdale, M. R., allowed an objection that the original defendants were not made parties to the supplemental bill, saying; "An accounting party ought to know who it is that calls upon him for an account. The case is just as simple as this;—a party calls for an account, and the defendant, at the hearing, is ready to account, and he is then for the first time informed that some of the plaintiffs have no right to call for such account, or that one of them has transferred his right to some one else, of whom the accounting party never heard before. Is it possible to support a record in such a state? I regret the extra expense to which the parties will be put by allowing the objection, but it would be much more to be regretted if an accounting party were to be ignorant to whom he is to account, up to the very time of the hearing. . . . The case of a defendant's interest being transferred is very different, for the plaintiffs remain the same to the end. In the cases referred to, where the interest of one of the defendants was transferred, the only thing necessary was, that the plaintiff should bring before the Court a proper substitute for such parties (i)."

Evidence.

As to the evidence necessary in the supplemental suit, it is founded on the same rules as those respecting the statements necessary in the supplemental bill, or in the original bill in the nature of a supplemental bill, by which the supplemental suit is instituted.—Every material fact stated in either bill must be admitted or proved, and the true question therefore on this point is, what are the facts material to be stated in the bill filed by or against the assignee. To the extent to which the new party is bound by the proceedings in the original suit, the proceedings themselves should alone be stated and proved, and not the

(i) *Feary v. Stephenson*, 1838, 1 Beav. 42.

original facts which were the foundation of those proceedings.

The assignee is of course bound by the evidence taken previously to the assignment; but not by any which may have been taken after the assignment and before he has been added to the suit. Thus where the assignees of a bankrupt defendant are brought before the Court by supplemental bill, evidence taken in the original suit *previously* to the bankruptcy, may be read at the hearing against the assignees (*k*); but where it appeared that some of the witnesses had been examined after the commission had issued, and before the supplemental cause was at issue, the Court allowed an objection to reading their depositions. So far, however, as the objection extended to the depositions previous to the commission, it was overruled (*l*).

So the assignees of a bankrupt defendant, brought before the Court by supplemental bill, are bound by the *accounts* taken before the bankruptcy, and cannot go into them again. But they are not bound by the accounts taken after the defendant became bankrupt, and before they were made parties (*m*).

Garth v. Crawford (*n*) is an important case on this point. In that case a testatrix had devised her real estate to be sold, and the proceeds to be divided between Crawford, Peters, and Mrs. Turner. She died in 1735, leaving Sarah Garth her heir at law. In April 1736 Mrs. Turner mortgaged her expectant share to Willis. In May 1736 Crawford, Peters, and Mrs. Turner filed a bill against Sarah Garth, to perpetuate the testimony of witnesses and to prove the will. In June 1736 Crawford purchased the interest

II. Where the Plaintiff adds the Assignee to the Suit.

How far the assignee is bound by the evidence.

(*k*) 1 Dan. Ch. Pr. 255.

2 Moll. 361.

(*l*) *Hitchens v. Congreve*, 1831, 4 Sim. 420.

(*n*) 1741, Barnard. Ch. 450; *vide S. C.*, 2 Atk. 174, where it is

(*m*) *Ormsby v. Palmer*, 1825,

called *Garth v. Ward*.

II. Where the Plaintiff adds the Assignee to the Suit.

of Peters under the will, and on the 3rd of January 1737 Willis purchased Mrs. Turner's equity of redemption. On the 8th of January 1737 Sarah Garth put in her answer, insisting that Peters and Mrs. Turner were papists, and therefore incapable of taking any thing under the will. Afterwards Sarah Garth filed a new bill against Crawford, Peters, Mrs. Turner, and Willis, to set aside the will as to the gifts to Peters and Mrs. Turner; to which the defendants put in their answers. An order was made in the cause that the depositions taken in the former cause should be read at the hearing; but an objection was taken by Willis that the depositions could not be read against him, because he had never been a party to the former suit, and the mortgage had been made to him by Mrs. Turner before the filing of the first bill, and his purchase of Mrs. Turner's equity of redemption had been made before Sarah Garth had put in her answer to that bill.

Lord Hardwicke said, "that his opinion was that these depositions ought to be read. That this was a question of very great consequence in respect of bills which were brought to perpetuate testimony; and if he should disallow the depositions to be read in the present case, it would overturn the whole use of these kind of bills. But, in saying this, he would distinguish between the mortgage which was made to Willis, and the purchase which was made by him of the equity of redemption; for, as to the mortgage, it was stated to have been made before the filing of the first bill, and therefore none of the depositions which were taken in that cause could anyways be read to affect it. But with regard to the purchase of the equity of redemption, which was made subsequently to the filing of that bill, the depositions ought to be read. For

the bill was brought in May 1836;—it was a bill brought by three devisees in order to perpetuate testimony, and to prove a will of real estate, and that is the only method of proving a will of that sort in this kingdom. The answer of Sarah Garth came in on the 8th of January following. It has been said that on the 3rd of January the purchase of the equity of redemption was made, which was before the time when the answer came in, and from thence it has been urged that the depositions which were afterwards taken shall not affect this purchase. But though the bill was filed in May, and the answer did not come in till the 8th of January following, yet that part of the objection is no reason against allowing the depositions to be read; for it very often happens, by the ordinary indulgences which are given to the putting in of answers, that an answer does not come in to a bill till that distance of time; nor will the other part of the objection, namely, that the purchase was made before the coming in of the answer, be material. The question is, whether the depositions in this case ought not to be read against a person who claims under one of those who were plaintiffs to that bill. It has been made an objection that that was a bill merely brought to perpetuate testimony, and to prove the will, and that no relief was prayed under it: and it is indeed true that that was not such a bill as could be brought to a hearing, and therefore that it could not properly create a *lis pendens*, so as to affect a purchaser claiming under one of these parties after the filing of the bill; but still it was such a suit that the proceedings under it, when rightly carried on, must affect those who claim as purchasers from one of the parties after the filing of the bill. It is of great consequence that bills of that kind should be supported; but if these

II. Where the Plaintiff adds the Assignee to the Suit.

II. Where the
Plaintiff adds
the Assignee
to the Suit.

depositions are not to be read, it would be in the power of either a devisee, or a person claiming as heir at law, to prevent such a bill being of any effect.

“ I will first consider the case of an heir at law. Suppose an heir gets into possession of an estate on the death of his ancestor, and the devisee that is out of possession brings a bill to perpetuate testimony, and to prove the will. The heir at law makes a secret conveyance to another person pending that suit. If the depositions taken in that cause could not be read against the person who claims under the heir at law, it would defeat the whole benefit of the suit. The case is just the same in respect of its consequences, if a devisee gets into possession, and brings a bill of this sort, and afterwards makes a private conveyance: if the heir at law could not read the depositions which were taken in that cause, against the party who claims under the devisee, the bringing that bill would be of no manner of effect. The bringing a bill of that sort by a devisee is a challenge to the heir at law to dispute the title with him; and if he does dispute it, namely, by examining witnesses of his own, the consequence is that he loses his costs, because by examining such witnesses, he has a benefit of the suit as well as the devisee.” These were the reasons upon which His Lordship’s opinion was chiefly founded, that the depositions in the present case ought to be read against Willis, and they were read against him accordingly.

The rules as to the proper manner of intituling the evidence, and also as to the defence, setting down for hearing, and decree (*o*), with respect to this sort of supplemental bill, seem to be the same as those

(*o*) For the form of a decree on this sort of bill, see the Appendix, No. XVIII.

already given in the second chapter of this treatise, with respect to the supplemental bills treated of in that place.

II. Where the Plaintiff adds the Assignee to the Suit.

After a decree the defendants, or any of them, may, if they think proper, bring the assignee before the Court by a new bill. Thus where, after decree, a defendant, *Corrall*, had given notice to the plaintiff, *Cattell*, of an intended motion, and before the motion was made *Cattell* became insolvent and an assignee of his estate was appointed; on *Cattell*'s requiring that the motion should be either made or abandoned, Sir James Wigram, V. C., said; "I cannot permit *Corrall* to make the insolvency of *Cattell* a reason for suspending indefinitely his present motion; and as he may by the practice of the Court file a bill to make the cause of *Cattell v. Corrall* perfect, I shall require him to do so forthwith, or entertain the application of the other parties to be relieved from the pendency of the notice (*p*)."
 It is apprehended that such a bill will be a supplemental bill merely, founded upon the decree, and not upon the merits of the case; because, as we have seen, a *plaintiff* may continue his suit against an assignee by such a bill; and after decree all parties are equally actors, and considered as plaintiffs. The objection arising from maintenance does not apply, because the party filing the new bill is not the assignee, but a person who has been made a defendant because he sets up a claim. It is also apprehended that in this case notice must be given to the original plaintiff, in order to give him an opportunity of filing the supplemental bill himself if he prefers it.

In the above case of *Cattell v. Corrall*, His Honor appears to have thought that it would not be necessary to wait until a decree had been made in the sup-

A defendant may bring forward the assignee after decree.

II. Where the Plaintiff adds the Assignee to the Suit.

Assignee comes in *pro bono et malo*.

plemental suit, before the pending motion could be entertained, but that the appearance of the assignee would be sufficient for that purpose. He declined however giving any positive opinion on that point.

It must be observed here that the new party to whom the interest of any party has been transmitted, stands in the same plight and condition *pro bono et malo* as the former party. He is bound by his acts and (in the case at least of a bankrupt's assignees) is liable to all the costs of his predecessor as well as his own costs, "though the matter has been twenty years in controversy (*q*).” Thus in *Whitcomb v. Minchin* (*r*), it was said that the assignees of a bankrupt defendant, brought by supplemental bill, might be liable to the costs of the whole suit if they improperly resisted the plaintiff's demand; but as it appeared in that case that the plaintiff had made no application to them on the subject of the suit previously to filing the supplemental bill, the costs were refused.

The above rule appears to apply as much to an assignee who adopts the original suit by taking the benefit of it in a supplemental suit, as to an assignee who is added to the original suit by supplemental bill (*s*).

III. Where the Assignee adds himself to the Suit.

III. Sometimes after decree a sole plaintiff enters into some transaction of which it is doubtful whether it is an assignment of his interest or not; or he makes only a partial assignment of his interest, or a co-plaintiff or a defendant makes an assignment, and the party conducting the suit being unwilling to notice such assignment, or having no occasion to do so, his rights not being affected thereby, omits to make the assignee

(*q*) 1 Atk. 89.

(*r*) 1820, 5 Madd. 91.

(*s*) 1 Atk. 89; *vide etiam Eades*

v. Harris, 1842, 1 Y. & Coll. C. C. 230.

a party to his suit, although the latter may have an interest in being brought before the Court. In this case the assignee is not always driven to file a bill, but may sometimes secure his rights by other means. Thus where there is a fund in Court, he may obtain, by *petition*, an order commonly called a Stop Order, providing that the assignor shall not take the fund out of Court without notice to the petitioner. So if a purchaser wishes to attend the Master under a decree, he may obtain an order to do so, if the order is qualified so that the plaintiff is not precluded from his remedies against the purchaser; the order being at the expense of the purchaser (*t*).

III. Where the Assignee adds himself to the Suit.

He may sometimes come in without filing any bill.

It is not always, however, that this indulgence is granted. Thus where, after the usual decree for account against executors, one of them became bankrupt, and the assignees petitioned for liberty to go before the Master on taking the accounts, and to be admitted on behalf of the bankrupt's creditors to support his discharge, the order was refused, on the erroneous ground, however, of the bankruptcy having caused an abatement (*u*).

In cases, therefore, in which a petition does not lie, the assignee is under the necessity of filing a new bill; and as he cannot, from the doctrine of maintenance already mentioned, literally continue the suit, he must by his new bill make out his whole case for relief and ask for the benefit of the former decree. As however the granting of such a prayer would be in effect giving him the conduct of another person's suit, while that other person is still capable of prosecuting it, and intends to do so, the assignee must, pre-

Otherwise he files a new bill, after giving notice to the plaintiff.

(*t*) *Toosey v. Burchell*, 1821, Jac. 159. For the order in this cause, see the Appendix, No. XIX. (*u*) *Russell v. Sharp*, 1813, 1 V. & B. 500.

III. Where the Assignee adds himself to the Suit.

viously to filing his new bill, apply to the plaintiff in order to give him an opportunity of adding the assignee to the first suit by supplemental bill. Should he neglect to make such an application, he will, upon his being added to the first suit, have to pay all the costs of his own suit (*x*). If the plaintiff, upon being served with such notice, disregards it, the assignee will file his new bill, and will obtain the benefit of the proceedings in the first suit, and liberty to prosecute it in the same way as the original plaintiff might have done.

Thus in *Philipps v. Clarke* (*y*), where a defendant became insolvent after decree, and his assignee, without any previous application to the plaintiff, filed a bill to get the benefit of the decree, and afterwards the plaintiff brought the assignee before the Court by supplemental bill, and thereupon the assignee moved that the plaintiff's supplemental bill might be taken off the file for irregularity; Sir Lancelot Shadwell, V. C., allowed an objection that this would be taking the conduct of the cause from the plaintiff and giving it to the assignee, saying; "I am of opinion that there is a material distinction between a case like this, in which a supplemental bill is necessary, and a case in which a common bill of revivor alone is necessary. In the former case the cause must be prosecuted to a hearing, and a decree must be obtained. The assignee should have applied to the plaintiff before he instituted his suit. He has brought the evil on himself by omitting to do so."

So in *Booth v. Creswicke* (*z*), where a bill had been filed by Jones, a second mortgagee, praying to redeem the first mortgage, and to foreclose the mortgagor

(*x*) *Philipps v. Clarke*, 1833, 7 Sim. 231; *vide etiam Foster v. Deacon*, 1821, 6 Madd. 59. (y) 1833, 7 Sim. 231. (z) 1837, 8 Sim. 352.

and subsequent mortgagees; and after a decree had been made in the suit, Creswicke, one of the subsequent mortgagees, assigned his interest in the mortgaged premises to Booth, who thereupon filed a bill against all the parties to the former suit, praying for the benefit of the suit, and to redeem the prior, and foreclose the subsequent, mortgagees; the Court dismissed the second bill as against all the defendants thereto except Creswicke, with costs; and ordered that in default of Creswicke's paying Booth his mortgage debt within a certain time, Creswicke should stand foreclosed; and in that case Booth was, as against Creswicke, declared entitled, in right of his mortgage security, to the benefit of the decree and proceedings in the first suit, and to stand in the place of and use the name of Creswicke in the further prosecution of the first suit, and in the meantime to be at liberty to attend the Master in taking the accounts in that suit.

III. Where the Assignee adds himself to the Suit.

It is apprehended that the disputed or partial assignee of a sole plaintiff, or the assignee of a co-plaintiff or defendant, upon bringing his bill after decree to have the benefit of that decree, must, as in the case of the total assignee of a sole plaintiff, be prepared to shew that the decree was a correct one; and that consequently if the assignment took place before the decree, so that the decree was erroneous for want of parties, the assignee, as in the above mentioned case of *Chunn v. Crofts*(a), could obtain no benefit from that decree. There is however a remarkable case of *Binks v. Binks*(b), which militates not only against this doctrine, but also against the doctrine that the laws of maintenance require an assignee to make out his case

How far the assignee gets the benefit of the former decree.

(a) *Supra*, in this chapter.

(b) 1813, 2 Bli. 593.

III. Where the Assignee adds himself to the Suit.

by an original bill in the nature of a supplemental bill, instead of merely continuing the suit by simple supplemental bill. In that case Thomas Binks, a creditor of Lord Rokeby, filed a bill for the sale of certain estates which had been assigned by Lord Rokeby to trustees for payment of his debts; and before decree Thomas Binks assigned his interest in the estates and debt to Richard Binks and others in trust for the payment of his, Thomas Binks's, debts. A decree was afterwards made for sale of the estates according to the prayer of the bill, whereupon Richard Binks and his co-trustees filed a simple supplemental bill, stating the filing only of the original bill, and not the facts of the case, and acknowledging that the decree had been obtained by mistake, but offering to confirm all the former proceedings, and join in the conveyance to the purchaser, and praying for the benefit of the decree and other proceedings in the cause. An objection by Lord Rokeby that the decree ought not to be carried into execution because it was erroneous, was overruled, and Richard Binks was allowed to carry on and prosecute the suit and have the benefit of the former decree.

Mr. Daniell says (c), that the reason why Richard Binks was allowed to proceed by a simple supplemental bill, was because the assignment to him was only partial, Thomas Binks having reserved an interest in the surplus. He says also that the assignee of a co-plaintiff or defendant may add himself to the suit by *supplemental* bill (d). He does not however give any explanation why a partial assignee of a sole plaintiff, or the assignee of a co-plaintiff or defendant, is less obnoxious in theory to the laws of maintenance than a

(c) 3 Dan. Ch. Pr. 165.

(d) Ibid. 163.

total assignee of a sole plaintiff. The circumstance of the assignor being made a party to the assignee's suit in the case of a partial assignment might perhaps warrant a simple supplemental bill in that one case; but this reason would not apply in the cases of suits by the assignees of co-plaintiffs or of defendants, any more than in the case of a suit by the total assignee of a sole plaintiff.

III. Where the Assignee adds himself to the Suit.

CHAPTER XII.

OF THE RISE OF A NEW INTEREST.

Nature of
the Remedy.

WE now come to the second of the three classes of defect above enumerated; namely, that which arises when, after a suit has been instituted, a new interest in the matter in litigation arises in a new person. This happens where a child is born, who becomes on his birth entitled under some will or settlement to an estate in the property which is the subject of the suit. From that moment the suit ceases to be complete, because there is a person interested who is not a party to it; and the defect must be supplied by bringing the new party before the Court.

In considering the mode in which this ought to be done, we shall find that the case nearly resembles that considered in the second chapter of this treatise, where a person, who is a necessary party at the time of filing the original bill, has been omitted to be made a party to it. For the new-born child neither claims an interest derived from a former party, as an assignee does; nor does he claim the property by an independent title in the place of a stranger whose interest has determined, as in the case of a bishop or rector: but he claims an entirely new interest which has never before been represented in the suit. The defect therefore occasioned by his birth is neither of that nature which requires the suit to be *continued* against him by a simple supplemental bill, nor does it require a *new suit* to be instituted, seeking the benefit of the former pro-

ceedings; but it is a defect *quasi* inherent in the suit from the beginning, and ought to be remedied by such a supplemental bill as has been treated of in the second chapter, in the case of an omission of a necessary party, and which is in the nature of an amendment of the original bill, and calls upon the defendant to answer that bill.

Nature of
the Remedy.

The frame (*a*) therefore of such a bill, and the proceedings upon it, will be such as have been already described in the second chapter; to which we may also refer for the mode of extending to the supplemental suit the benefit of proceedings previously had in the original suit.

Where the child, born *pendente lite*, is a tenant *in tail*, the rule is somewhat different.—In the peculiar case of a suit instituted against a *prior* tenant in tail, we have already seen that it is not necessary to bring before the Court any tenant in tail in remainder, because the first tenant in tail is supposed to represent the whole inheritance; and that consequently, if the prior tenant in tail dies, the suit is *continued* against the tenant in tail in remainder, by supplemental bill merely, with liberty to the tenant in tail in remainder to state any special circumstances attaching to his case. In analogy to this rule, the same practice is adopted in the reversed case of a prior tenant in tail coming into *esse* during a suit which has been commenced against the remainder-man in tail. The prior tenant in tail is put in the place of the remainder-man in tail by a simple supplemental bill, and the suit is *continued* against him without his being called upon to answer the original bill; he being bound by the proceedings had against the remainder-man in tail in consequence of their supposed identity of in-

Where an intermediate tenant in tail comes into *esse*.

(*a*) For a precedent of this sort of bill, see the Appendix, No. XX.

Nature of
the Remedy.

terest ; with liberty however to state any special circumstances attaching to his case. In such a case it is apprehended that the suit would be dismissed as against the tenant in tail in remainder, as being, by the rule above given, no longer a necessary party to the suit.

The above rule is thus laid down by Lord Eldon :—
“ In the very ordinary case where the bill is filed for the purpose of raising a charge against the inheritance, divided into estates tail, against a remote remainder-man, those intermediate not being yet in *esse* ; if the cause has proceeded a certain length, on an intermediate remainder-man coming into *esse* you go on to state the former proceedings ; and that is held allegation sufficient to put the facts in issue with regard to that sort of defendant. But I admit the general opinion that if in such a case witnesses have been examined against the former defendant, yet upon the other’s coming into existence, the plaintiff must examine again. It is so said ;—*I doubt it* : and am of opinion that whenever the case shall arise, if the witnesses should die, this Court upon its own principles may hold the subsequent defendant entitled to the benefit of that testimony. So I should also say that this sort of principle, arising out of what the Court does for the convenience of justice, must be applied both for and against the tenant in tail ; subject always to this, that where the tenant in tail takes a different interest, or rather a similar interest not affected by the same circumstances, it is competent both for and against him to bring forward the equities belonging to those different circumstances, as contra-distinguishing his case (*b*).”

CHAPTER XIII.

OF THE CESSATION OF INTEREST DURING LIFE.

THERE remains only the third species of defect above noticed ; namely, that which arises from the total cessation of the interest of a party during his life.

Nature of the
New Proceed-
ings.

We have seen that on the death of a party whose interest does not devolve on his heir, devisee, or personal representative, but ceases with his life, the suit, as regards that party, does not abate, so as to be capable of revivor, but is wholly terminated ; although the benefit of it, to some extent, may be obtained by or against any person who succeeds to the property and who is not already before the Court, by means of a bill in the nature of a supplemental bill. In like manner, if, during the life of a party, his interest in the subject matter of a suit wholly terminates, and does not pass to any assignee or person claiming under him, the suit, as regards such party, does not become defective merely, but is wholly terminated. Here however also the benefit of the suit may be obtained by or against a successor to the property not already before the Court, by means of a bill in the nature of a supplemental bill.

The result is, that it makes no difference, when an interest wholly ceases, whether the party entitled to that interest is living or dead. In both cases the suit is wholly at an end as regards him :—in both cases the benefit of it may by a new suit be extended to or against his successor.

Nature of the
New Proceed-
ings.

In *The Attorney General v. Foster* (a), an information had been filed against the trustees, master, and usher of a school; and before the suit came to a decree, three new trustees were appointed; and after decree, upon the resignation of the master and usher, a new master and usher were appointed. The three new trustees and the new master and usher were thereupon brought before the Court by a *supplemental* information only, and not by an original information in the nature of a supplemental one, putting the original facts in issue; and the three new trustees put in a joint answer, and the new master and usher put in another joint answer, by which answers they all insisted that they were not bound by the former suits, and made new defences, and claimed the benefit of the old defences made by their predecessors. Exceptions to the new defence made by the new trustees were overruled by the Master and by Sir James Wigram, V. C. (b), on the ground that their appointment to the office of trustees had been before the hearing and date of the decree, and that they had the same right now to answer and defend, as if they had been made parties immediately upon their appointment; but exceptions to the new defence made by the new master and usher having been allowed by the Master, on the ground that they were appointed after the date of the decree, and were therefore bound by the defence of the then master and usher; Sir Lancelot Shadwell, V. C., allowed exceptions to the Master's certificate, saying, "The new high master and usher came into an estate which was the same as their predecessors had, but not by reason of any privity with their predecessors. It seems to me to be the same case as against a

(a) 1842, 1843, 6 Jurist, 1032,
and 7 Jurist, 185.

(b) 6 Jurist, 1032; *vide etiam*
2 Hare, 81.

bishop or a parson. If a decree were made in a cause in which a parson was a defendant, and then, the decree being unexecuted, a change in the office should take place, and a supplemental bill, that is to say an original bill in the nature of a supplemental bill, should be filed against the new parson, it appears to me that the very fact of filing the bill admits that the defendant may make a defence; and all that these gentlemen, as I understand it, have done in their answer, is this—they state some circumstances which may or may not have the effect of shewing that, though the decree in the original cause was right, which they do not dispute, yet that that decree ought not to be binding upon them; that is all. And I can conceive myself a great variety of circumstances which might tend to shew that, admitting that the decree in the original cause was clearly right (because a decree is right, if, with reference to the things alleged in the cause, and the things proved in the cause, the decree, is right,) still when an original bill in the nature of a supplemental bill is filed against persons who come into the same estate, but not by reason of privity with the former holders of the estate, and the question is whether the decree shall be carried on against them, they may shew many reasons, speaking of it generally, why that decree should not be carried into effect against them.”

It is submitted that all the difficulty of the above case would have been avoided if a higher ground of objection had been taken by the defendants' counsel, and if the Attorney General had been compelled, as according to Lord Redesdale(c) he ought to have been, to bring the new trustees, master, and usher, before the Court by an *original* information in the nature of

(c) Ld. Red. ed. 4, p. 72.

Nature of the
New Proceed-
ings.

a supplemental information, *putting the whole case in issue again, and praying specific relief against them*. In that case the defences put in to the second information would have been quite independent of the former defences, and no question could have arisen respecting them. This second information would also have been carried on to a decree, independent of the former decree, in the usual way, and such second decree would have been "similar" to the first decree if the circumstances of the cases made out were similar, and dissimilar to the former decree if the circumstances were dissimilar. The right to adopt against a successor a decree against his predecessor, with liberty to the successor to state special circumstances affecting his case, only arises in the peculiar case of *tenants in tail (d)*, against whom the original suit is properly *continued by mere supplemental bill* on account of their supposed identity in representing the whole inheritance; and not in the case of a bishop, parson, or other corporation sole; these latter being entitled to their new defences on the higher ground of perfect independency of title.

Exceptions
to the Rule.

Administrator
durante minori
etate.

To the doctrine which treats a suit as terminated by the cessation of a party's interest, and obliges his successor to commence *de novo* by original bill, there are the same exceptions in cases of persons suing *in auter droit*, as have been formerly pointed out in treating of the deaths of parties (*e*). Thus where an administration has been granted *durante minori etate*, and the infant comes of age, and takes the administration upon himself, he claims not *under*, but independently of, the first administrator. Properly therefore an original bill in the nature of a supplemental bill ought to be filed by or against him in order to carry out the ob-

(d) *Vide supra*, Chap. X.

(e) *Vide supra*, Chap. X.

jects of the original suit. But here, in consequence of the interest of both administrators being fiduciary only, the Court regards such interest as transmitted from one to the other, and allows the suit to be continued by supplemental bill (*f*). It is true that there is an old authority which holds that where there is no will, and the parties are simply administrators, and not administrators *cum testamento annexo*, the general rule applies, and a new suit must be commenced; particularly where the original party has not proceeded to a decree and an account (*g*); but Lord Redesdale makes no distinction between cases of administration *durante minori ætate*, *cum testamento annexo*, and cases *sine testamento annexo*, but includes all administration *durante minori ætate* in the exception to the general rule (*h*). And there is even a case (*i*) from which it might be inferred that no new step whatever was necessary to be taken by the infant, but this inference is corrected by later authorities.

Exceptions
to the Rule.

Lord Redesdale also includes in the exceptions to the general rule the case of an administration *pendente lite* determining during the suit (*k*).

New assignees in bankruptcy and insolvency, and new committees of lunatics or idiots, appointed on the removal of the former assignees and committees, are brought before the Court by the same process as those appointed on the deaths of the former assignees and committees, which has been considered in a previous chapter (*l*).

If the party on whom the interest devolves is already

(*f*) Ld. Red. ed. 4, p. 64; *sed vide Coke v. Hodges*, 1681, 1 Vern. 25.

(*g*) *Jones v. Bassett*, 1701, Pr. Ch. 174.

(*h*) Ld. Red. ed. 4, p. 64.

(*i*) *Anon.*, 1602, Cary, by Lam-

bert, 31, where the circumstance is said not to *abate* the bill; but *Stubbs v. Leigh*, 1784, 1 Cox, 133, says that there is no way of avoiding a supplemental bill.

(*k*) Ed. 4, p. 64.

(*l*) *Supra*, Chap. X.

Administrator
pendente lite.

New assignees
in bankruptcy
and insolvency.

Exceptions
to the Rule.

before the Court, it is apprehended that the cessation of the other party's interest will cause no defect in the suit; but that, as in the case of the death of a tenant for life, not being a sole plaintiff or sole defendant, the suit will proceed as before, without further difference than the omission of such party's name in the subsequent proceedings.

Rightful heir
put in the place
of a wrongful
heir.

Another exception to the rule which requires a party claiming by an independent title, to commence *de novo*, is found in the peculiar case of a person having been made a party to a suit under a character which he had no right to assume, while the party really entitled to that character has been excluded from the suit. In such a case it appears that if the suit has proceeded to a decree, the party really entitled, if he desires to prosecute the matter, is not obliged to commence *de novo*, as would at first sight appear to be necessary, but may file a bill founded, not upon the facts of the case, but upon the decree already obtained, and praying that he may have the benefit of that decree, and that it may be reversed so far only as to place him in every respect in the situation of the party by whom the character has been wrongfully assumed. Thus in *Oldham v. Eboral* (*m*), where a reference had been directed to the Master to find the heir at law of Samuel Oldham, and he reported that there was no heir *ex parte paternâ*, but that Eboral was the heir *ex parte maternâ*; and Eboral was accordingly brought before the Court by supplemental bill, and the possession of a freehold estate decreed to him; and afterwards a Mrs. Oldham and other persons were discovered to be the heirs at law *ex parte paternâ* of Samuel Oldham, and they accordingly filed a bill against Eboral and the other parties on the

(*m*) 1833, 1 C. P. Cooper, temp. Brougham, 27.

record to the former suit, praying for the benefit of the proceedings in the former suit, and that the same might be reversed so far as the title of Eboral was thereby set up in opposition to them in their character of heirs at law ; Lord Brougham, C., made the decree sought for by the bill. Exceptions
to the Rule.

The forms of proceedings upon the supplemental bills, and original bills in the nature of supplemental bills, mentioned in this chapter, correspond with those described concerning the bills of the same names mentioned in former chapters.

CHAPTER XIV.

OF EVENTS WHICH DO NOT ALTER THE PARTIES.

Nature of the Remedy. THERE are several events which may occur in the course of a suit in equity, and which must be brought before the Court before the full effect of the suit can be obtained, but at the same time do not vary the interest of any person in the matter so as to make any alteration necessary in the parties to the suit. Thus where a plaintiff has an inchoate right at the time of filing his original bill, he may afterwards complete that right by some act. The suit then becomes defective for want of such act being stated to the Court, and it will be necessary for the plaintiff to bring it before the Court in the manner mentioned hereafter.

Amendment. In some few instances such an event may be introduced into the original bill by way of *amendment*. An executor proving a will, or a person taking out administration after the institution of the suit, being the plaintiff, may state those facts to the Court by amendment of the original bill.

Thus in *Humphreys v. Humphreys* (a), where a plaintiff filed her bill as next of kin of an intestate with a right to administer to him, and a demurrer thereto was allowed with liberty to amend, and thereupon the plaintiff took out letters of administration to the intestate, and charged the same by way of amendment, Lord Chancellor Talbot overruled a plea that the taking out administration was subsequent to the ori-

(a) 1731, 3 P. W. 350.

ginal bill, and therefore ought to have been brought before the Court by supplemental bill and not by amendment; observing that the administration when taken out related back to the time of the death of the intestate.

Nature of
the Remedy.

From the language of this decision it is apprehended that the fact of a *defendant's* proving a will or taking out administration after the institution of the suit, may equally be introduced by the plaintiff into the original bill by way of amendment.

So it appears that matter occurring between the bill and answer, and stated by way of defence in the answer, may sometimes be introduced into the original bill by amendment.

The case of *Knight v. Matthews* (c) gives us an instance of such a proceeding. In that case the defendant Matthews had commenced an action against Knight, the plaintiff, to recover back a certain deposit, being part of the purchase money of a house, and Knight had filed a bill to compel Matthews to complete the purchase. After the bill was filed the action was tried, and the verdict was in favour of Matthews; who thereupon sent back the key of the house to Knight's solicitors, and stated these facts in his answer to the bill. Thereupon Knight amended his bill by stating the verdict and the sending of the key, and by charging that the verdict had given only nominal damages, and that the solicitors had refused to take the key; and it was held that these amendments were good; "For," said Sir Thomas Plumer, V. C., "The plaintiff, when he filed his bill, [on the 27th of July, 1815,] stated the matters as they then stood. The answer was put in on the 14th of November, 1815. In the interval many circumstances might have occurred; and the defendant, when he puts in his answer, must

(c) 1816, 1 Madd. 566.

Nature of
the Remedy.

state the facts as they *then* are ; and if circumstances are introduced into the answer, which occurred subsequently to the filing of the bill, the plaintiff must be allowed to make amendments to the bill, so as to shew that such new circumstances are not of the colour the defendant represents them, and so as to obtain a complete answer as to such circumstances. There must be some mode of meeting the defence. It is said it can only be done by supplemental bill. Would not that occasion bills without end?—for then all facts occurring between the bill and answer must be stated by supplemental bill, and thus, fresh facts occurring, many such bills might be necessary.”

Supplemental
bill.

But as a general rule,—and even in cases similar to the above when the proceedings are too far advanced to allow of amendment,—the party conducting the suit must file a supplemental bill, stating the new matter necessary to be brought before the Court, and praying the relief consequent upon such new matter.

Nature of the
Supplemental
Matter.

It is not every event which may occur subsequently to the institution of a suit, that will form a good ground for a supplemental bill ; even without having regard to the few instances above-mentioned of the introduction of such events by way of amendment. The supplemental matter may be such as cannot be brought forward in the same suit at all.

Bill will not lie
to support a
bad title.

Thus where the title of the plaintiff is absolutely bad at the time of filing the original bill, he cannot support it by bringing forward a new event by which he acquires a good title after the filing of the original bill.

Thus in *Tonkin v. Lethbridge (d)*, a person claiming as heir of a mortgagor filed his bill for redemption of the mortgage. The defendant denied the heirship of the plaintiff ; whereupon the plaintiff amended his bill

by stating that he had purchased the interest of the real heir since the institution of the suit, but called for no further answer. At the hearing an issue was directed to try whether the plaintiff was the real heir, and he was found not to be so; whereupon he filed a supplemental bill stating a confirmation of the sale by the real heir. On demurrer for that the new matter was not matter of supplement, Lord Eldon said, "To entitle a plaintiff by supplemental bill to the benefit of the former proceedings, it must be in respect of the *same title* in the *same person* as stated in the original bill. If in the present case the title now relied on was sufficiently stated in the original bill, that is good ground for a *rehearing* of the cause; if it is not, then any third person as well as the plaintiff might file a supplemental bill. If two original bills had been filed to redeem, one by the present plaintiff, and the other by Kekewich (the real heir), and then the issue at law was found in favour of Kekewich, whereupon the plaintiff had bought Kekewich's title, it is clear that the purchase should be stated by supplemental bill (*e*) in Kekewich's suit, and not in the present plaintiff's." The bill however was dismissed without prejudice to the plaintiff's right to file a new original bill.

Nature of the
Supplemental
Matter.

So where a solicitor instituted a suit for payment of costs due to him from a client, and it appeared from the answer that he had not delivered a signed bill conformably with the Act of Parliament, and a bill duly signed was subsequently delivered, and that fact stated by a supplemental bill; it was held that the title was not cured thereby, and that the supplemental bill would not lie (*f*).

(*e*) It is apprehended that this should be Original Bill in the nature of a Supplemental Bill. But Mr. Justice Story remarks, very truly, that the two terms are continually substituted for one another in the books. Story's Eq. Pl. 273.
(*f*) *Pritchard v. Draper*, 1830, 1 R. & M. 191.

Nature of the
Supplemental
Matter.

And where a defendant, in answer to a bill by the assignees of a bankrupt, alleged that the plaintiffs had not obtained the necessary consent to the institution of the suit, whereupon the plaintiffs filed a supplemental bill stating that since the filing of the original bill they had obtained the necessary consent, a demurrer was allowed (*g*).

However, it appears that under peculiar circumstances the Court will depart from the strict letter of this rule. Thus where a plaintiff claimed as having been nominated by his father to a church, and filed his bill for an account of the profits, he afterwards amended his bill by stating that the equitable right of nomination claimed by his father had by his father's will, and a certain deed of release from his sisters, become vested in the plaintiff. It appeared that the plaintiff's title could not have been sustained under the instrument executed by his father, and that the deed of release from his sisters formed an essential part of his title; but it was held that as that deed was not executed until after the bill was filed, the Court could not enter into the consideration of the plaintiff's claim, because, as the record then stood, a decree affirming the plaintiff's title must have reference to the date of the bill, and would affirm the title in the plaintiff *at that time*. However, as great expense had been incurred, Sir John Leach, M. R., directed the cause to stand over in order that the plaintiff might file a supplemental bill for the purpose of regularly introducing the release from his sisters (*h*).

The new event
must be ma-
terial.

It appears that the new event cannot be brought before the Court by supplemental bill, unless it is absolutely necessary to put it in issue for the purposes

(*g*) *King v. Tullock*, 1829, 2 Lawson, 189.

Sim. 469; *vide etiam Davidson v.*

Foley, 1791, 3 Bro. C. C. 598; and Russ. 42.

Byrne v. Byrne, 1842, 1 Conn. &

(*h*) *Mutter v. Chauvel*, 1828, 5

of the suit. Thus, in a suit in Ireland, where a tenant filed a bill against his landlord for a certain account, and for an injunction to restrain an action of ejectment, and on default by the tenant in complying with a certain order, the injunction was dissolved, whereupon the landlord executed his *habere*; an objection was made at the hearing that as the possession had been changed pending the suit, by the execution of the *habere*, and as it was no part of the prayer of the original bill to have the possession restored, the plaintiff ought to have filed a supplemental bill to put that matter in issue, and pray that specific relief. But Lord Redesdale said that it was not the practice in England to file a supplemental bill where there was a mere change of possession on dissolving an injunction, and where there were no accompanying circumstances, so that the only object of the supplemental bill would be to state that fact;—because it was a fact within the view of the Court (*i*).

Nature of the
Supplemental
Matter.

The new event must be material and beneficial to the *merits* of the original cause, and not merely such as bears as *evidence* upon the facts in issue in the original cause. Such, says Mr. Justice Story (*k*), seems to be the result of Lord Eldon's reasoning in *Milner v. Harewood* (*l*). In that case the plaintiff filed a supplemental bill stating new facts which happened after publication in the original cause, and which he contended would be material and useful in evidence upon the hearing of the original cause. But Lord Eldon said, “there is no recollection of a supplemental bill of this kind; and if a new practice is to be settled, my opinion is that when a case arises where either a conversation or an admission of a defendant becomes material after answer or replication, or, as in

It must be
material to the
merits and not
to the *evidence*.

(*i*) *O'Connor v. Spaight*, 1804,
1 Sch. & Lef. 305.

(*k*) Eq. Pl. 274.

(*l*) 1810, 17 Ves. 148.

Nature of the
Supplemental
Matter.

this case, after examination of witnesses in the original cause, or if a new fact happens after publication which it is material to have before the Court in evidence when the original cause is heard, it is much better that the examination of witnesses if required should be obtained on a special application for the opportunity of examining and for having the depositions read at the hearing; or if discovery is required, that the party should file a bill for that purpose merely; and if relief is required, that the answer comprehending the discovery should be read at the hearing of the original cause."

In *Adams v. Dowding*(*m*) Sir Thos. Plumer, V. C., after referring to the above case of *Milner v. Harewood*, said that "where there is no alteration in the interest of the parties, nor any particular circumstance requiring further discovery, but where only a fact has occurred which might be proved on taking the account prayed by the original bill, and the relief is not varied by the supplemental matter, but the plaintiff might, under the original bill, have the relief prayed by the supplemental bill, in such a case a supplemental bill is improper."

The case of *Morris v. Ellis*(*n*) however seems to be opposed to the above doctrine. In that case a bill was filed by a rector for an account of tithes, and the occupier set up a modus as a defence, and died, whereupon the suit was revived against his representatives. Afterwards the Tithe Commutation Act(*o*) having passed, and the commissioner appointed thereunder having decided in favour of the modus as between the rector and the then occupier; and the rector having thereupon brought an action against the landlord and obtained a verdict against the modus; it was held that

(*m*) 1816, 2 Madd. 53.

(*n*) 1842, 6 Jurist, 547.

(*o*) 6 & 7 W. 4, c. 71.

these subsequent facts were properly introduced in a supplemental bill, as matter of evidence against the representatives of the deceased occupier.

Nature of the
Supplemental
Matter.

But where the new matter is such as will *confirm* the plaintiff's case, and is not merely good as *evidence* in the cause, a supplemental bill will lie for discovery of such matter. Thus where a purchaser of an estate filed a bill for specific performance against a vendor, who refused to complete the contract on account of the price being inadequate, and after issue joined and witnesses examined, but before publication, the vendor contracted to sell the estate to a third person at a less price than the price agreed upon in the former contract; it was held, on demurrer, that a supplemental bill by the plaintiff, for discovery of certain correspondence relative to the second contract, was good, inasmuch as it was useful in support of the plaintiff's case (*p*).

If a plaintiff wishes to obtain a writ of *ne exeat regno* against a defendant, he must, as a general rule, pray for the writ by his bill; but if the defendant's intention to go abroad comes to the plaintiff's knowledge after the filing of the bill, he may obtain the writ upon an affidavit of the fact of such intention, without being obliged to state that fact in a supplemental bill (*q*).

Not necessary
in order to ob-
tain a *ne exeat*
regno.

It is true that in *Sharp v. Taylor* (*r*), Sir Lancelot Shadwell, V. C., said that a supplemental bill must be filed for that purpose; but in that case it appeared that there had been sufficient ground for praying the writ, at the filing of the original bill, and that addi-

(*p*) *Usborne v. Baker*, 1817, 2 Madd. 379. In this case the Court held on a demurrer for want of materiality in the new matter, that it had a right to look into the original bill and answer, although not distinctly referred to them; because

the materiality of the new matter could only be ascertained by such reference.

(*q*) *Barned v. Laing*, 1843, 7 Jurist, 383.

(*r*) 1840, 11 Sim. 50.

Nature of the
Supplemental
Matter.

Where the
subject matter
of the suit has
become al-
tered.

tional circumstances had afterwards come to the knowledge of the plaintiff. "That case therefore," said Lord Lyndhurst, C., "stands by itself(s)."

A supplemental bill may be filed for the purpose of stating an alteration which has taken place in the actual subject matter of the suit, since the institution of the suit, if such alteration has the effect of varying the relief prayed, or of affecting a decree already made in the suit. Thus in *Nelson v. Bridges*(*t*) the plaintiff, Nelson, filed a bill for specific performance of a contract by one of the defendants, Bridges, to allow the plaintiff to raise stone under a certain piece of land, the plaintiff having already entered and commenced working, but Bridges having in the mean time let the quarry to the other defendant Woodward. Afterwards Bridges recovered possession in an action of ejectment against Nelson, and Woodward entered and commenced working; and a decree for specific performance was made in Nelson's suit. Upon this Nelson filed a supplemental bill against both defendants, praying for a reference to the Master to ascertain the damages sustained by the plaintiff by Woodward's entry and working, and that the amount might be paid by the defendants; and upon an objection being taken to the supplemental bill, for that the plaintiff ought to have proceeded under the decree for specific performance to get his licence antedated, and then to have proceeded for his damages by an action at law, Lord Langdale, M. R., said; "It has already been declared that the plaintiff is entitled to a specific performance of the agreement; but, pending the proceedings, the very subject of the agreement to which the plaintiff has by the decree been declared entitled, has been abstracted. * * * * * If that circum-

(*s*) 7 Jurist, 383.

(*t*) 1839, 2 Beav. 239.

stance had been known at the first hearing, I cannot have the least doubt but that the Court would, in the exercise of its jurisdiction, have put in a due course of investigation the question of the amount of compensation which ought to be made to the plaintiff; but it was not brought to the attention of the Court at that time, and a supplemental bill is now filed for the purpose of obtaining compensation. It is said that such compensation might originally have been had at law; or, if not, that at least it might have been obtained at law by perfecting the decree for the specific performance of the agreement in some particular form; but I am of opinion that it is not necessary for this Court, when it has once entertained jurisdiction in a case, to resort to that circuitous mode of giving relief." His Lordship then declared that the plaintiff was entitled to relief, and that the amount ought to be ascertained by an action at law, because the profit made by the defendant was not the measure of the damages done to the plaintiff, the quarry not having been worked in a way to make the most of it, and therefore it was a case of damages and not of account; and he added, that the proper mode of assessing the amount of the damage would be to require the defendants to admit such facts as were necessary, and to allow the plaintiff to bring an action to ascertain *quantum damnificatus*.

A supplemental bill of interpleader will lie respecting an addition to the original subject matter. Thus where after the institution of an interpleader suit respecting a sum of £496, a further sum of £6 was received by the plaintiffs, and a claim was then made by the defendants for interest on the £496 whilst in the hands of the plaintiffs; and the plaintiffs filed a supplemental bill of interpleader respecting the £6 and the interest on the £496; it was held that the

Nature of the
Supplemental
Matter.

Where the
subject matter
of the suit has
become aug-
mented.

Nature of the
Supplemental
Matter.

To alter the
relief when the
first relief has
become impos-
sible.

supplemental suit was not irregular as to the £6, because it had been received after the institution of the original suit, but that it was irregular as to the interest on the £496, because that was due at the time of the institution of the original suit, and was therefore proper subject for amendment (*u*).

A supplemental bill will lie for the purpose of altering the relief prayed by the original bill, when that relief has become impossible from subsequent proceedings. Thus where a bill was filed against Peters, Carroll, and Hamburger, to have certain bills of exchange obtained by Peters, and indorsed by him to Carroll, and by Carroll to Hamburger, delivered up to be cancelled, and for an injunction to restrain an action commenced by Hamburger against the plaintiff, and for further relief, the injunction was refused. Afterwards, Peters having fled to America, the plaintiff filed a supplemental bill against Hamburger alone, stating that, in consequence of the refusal of the injunction, the action had been proceeded with, and judgment obtained, and that the plaintiff had paid the damages and costs recovered against him; and alleging that there had been various admissions, and correspondence containing admissions, of the truth of the statements in the bill, and praying repayment of the damages and costs. On a general demurrer to the supplemental bill for want of equity, and for that Carroll was not made a party, Lord Langdale, M. R., said; "The case for the demurrer has been argued in the only way in which it could be argued, namely, that a supplemental bill was unnecessary; and thence it is inferred that it ought not to have been filed at all, and that the general demurrer ought to be allowed. I do not see the force

(*u*) *Crawford v. Fisher*, 1842, 1 Hare, 436.

of that inference. A new fact is introduced, and new circumstances are stated to have taken place, in consequence of which the plaintiff cannot have the specific relief prayed by the original bill. But in consequence of the circumstances stated in the supplemental bill, the plaintiff claims to be entitled to other relief, and instead of having the bill delivered up, he asks for repayment of the money. It is clear, if the suit were carried to a hearing, the Court could not grant the relief prayed by the supplemental bill without the introduction of the new facts. But it is said that that might be done by petition and affidavit; and if there was neither a supplemental bill, nor petition and affidavit, the new fact might be introduced by admissions between the parties; and if the parties refused to make such admissions, and the probability of such a case appears here, the Court will, in the absence of other means, refer it to the Master to inquire. If the Court can plainly see, and cases of that description have occurred, what specific relief ought to be granted in consequence of a new fact having occurred, it will grant that relief at the hearing. But has not the plaintiff a right to anticipate all the difficulties which may arise at the hearing? The question here appears to be whether the plaintiff has such a right or not; and I think, looking at the pleadings, the plaintiff has a right to bring the new matter forward by supplemental bill." His Lordship however said that Carroll was a necessary party to the supplemental bill, and allowed the demurrer on that ground (x).

Nature of the
Supplemental
Matter.

In a suit for an account of receipts and profits, such account may now be taken up to the time of taking it, and is not confined to an account up to the

For an account
of receipts
and profits.

(x) *Pinkus v. Peters*, 1842, 6 Jurist, 431.

Nature of the
Supplemental
Matter.

filing of the original bill, although it appears that formerly the contrary practice prevailed, and that a new suit was necessary in respect of receipts and profits subsequent thereto. The same is now the practice with respect to bills for tithes, although formerly it was otherwise (y). But where the account arises *in consequence* of the suit, there the account cannot be taken without filing a supplemental bill for the purpose.

Thus where a bookseller filed a bill against another bookseller for piracy in publishing a certain work, and obtained an injunction against him; and the defendant by that bill received notice for the first time that his author was under a covenant with the plaintiff not to write such a work, and upon having the injunction dissolved undertook to keep an account of his profits until after the trial of an action at law, to be brought by the plaintiff to try the piracy; it was held that as a plaintiff must establish a title to relief at the time of filing his bill, and as the plaintiff in this case had no such title to relief at the time of filing his bill, the defendant having only received notice, by that bill, of the covenant above mentioned, an account of the receipts and profits *subsequent* to the filing of the bill could not be decreed without the plaintiff's filing a supplemental bill alleging that the defendant had continued to publish the work after the filing of the original bill (z).

Will not lie to
alter a decree
already made.

A supplemental bill on matter arisen subsequent to the filing of the original bill will not lie for the purpose of altering a decree already made in the cause. Thus where after a decree directing incumbrances to be paid according to priority, the plaintiff, a creditor, ob-

(y) So said in *Barfield v. Kelly*, 1828, 4 Russ. 355. (z) *Barfield v. Kelly, ubi supra*.

tained an assignment of an old mortgage, and filed a bill to have the advantage which it would give him by way of priority over the demands of some of the defendants, a demurrer was allowed, because such bill was against the usual course of the Court. For though it was a bill to vary a decree, yet it was neither a bill of review, nor a bill in the nature of a bill of review, which are the only kinds of bills that can be brought to affect or alter a decree, unless the decree has been obtained by fraud (*a*).

Nature of the
Supplemental
Matter.

The general form of the bill in question must be guided by the same rules, *mutatis mutandis*, as those already given in the second chapter of this treatise respecting supplemental bills for introducing new matter existing at the time of the institution of the suit.

Form of the
Bill. Parties,
&c.

As to the parties to the bill, we have before remarked that a party conducting a suit has a right to conduct it in his own way. As, therefore, the effect of a defendant's attempting to introduce a new event into the suit by filing a supplemental bill, would be to take the conduct of the cause from the plaintiff, it is only the plaintiff who can make use of the remedy in question, at least before decree. The bill ought in general to be filed against the same persons as were parties to the original bill, because, if the latter was properly framed, all the parties to it will be interested in the new matter. If however they are not all interested in it, the supplemental bill ought, it is apprehended, to be filed against those only who are interested in it.

In *Jones v. Jones* (*b*), there is a dictum of Lord Hardwicke's, that to a supplemental bill filed for new

(*a*) Coop. Eq. Pl. 217; *Wortley v. Birkhead*, 1754, 3 Atk. 809, 811; S. C. 2 Ves. sen. 571, 576.
(*b*) 1745, 3 Atk. 217.

Form of the
Bill. Parties,
&c.

matter arisen since the filing of the original bill, all the defendants to the original bill must be parties.

So in *Greenwood v. Atkinson* (c), Sir Lancelot Shadwell, V. C., says; "Where a supplemental bill is filed for the purpose of putting in issue a new fact, it is right to make the original defendants parties to it."

The above expressions are very general, but they seem to be founded on this reasoning;—that as the supplemental matter is not merely a change in one of the parties interested in the suit, but some material addition to the original subject matter of the suit, every defendant will be as much interested in questioning it, as he was in questioning the original subject matter, and therefore must be made a party to the supplemental bill, in order to have an opportunity of raising such question.

It only remains to observe that all the proceedings upon such a supplemental bill as is now in question will be similar to those already set forth in the second chapter of this treatise, with respect to the supplemental bills there spoken of.

(c) 1832, 5 Sim. 422; *vide etiam* *Pinkus v. Peters*, 1842, 6 Jurist, 431, and *supra* in this chapter.

ADDENDA.



SINCE the earlier part of this work was printed, the Vice-Chancellor of England has confirmed the opinions which he had previously expressed on the three following points ;—first, that new matter existing at the time of filing the original bill, if it contradicts the original issue, is matter for *amendment* only, and not for supplemental bill (*a*) ; but that, secondly, if it does *not* contradict the original issue, the plaintiff may, after replication, either apply for leave to amend, under the Fifteenth Order of 1828, or he may file a supplemental bill, at his option (*b*) ; and thirdly, that if he adopts the latter course, the supplemental bill may be filed without the leave of the Court, the Fifteenth Order being applicable to amendments only, and not to supplemental bills (*c*).

Amendment
and Supple-
mental Bill.

Such are the points decided in the recent case of *Pemberton v. Walford* (*d*). In that case a supplemental bill had been filed after replication, to bring forward new matter which had occurred prior to the filing of the original bill. It appears that the new matter was merely an addition to the original case, and not a contradiction of it. On a demurrer for that the new facts were matter for amendment, and not for supplemental bill, and that therefore the case came within the meaning of the Fifteenth Order of 1828, Sir Lancelot Shadwell, V. C., said, “ I have nothing to shew me

(*a*) *Supra*, p. 12.

(*b*) *Ibid.* pp. 6, 7.

(*c*) *Ibid.* p. 13.

(*d*) 1843, 7 Jurist, 364.

Amendment
and Supple-
mental Bill.

that a party is, by the Fifteenth Order, deprived of a right which he had before that Order, of filing a supplemental bill, and putting in issue matter discovered since the filing of the replication:—that was the old practice, and *primâ facie* that right remains. . . . In the case of *The Attorney-General v. The Fishmongers' Company* (e), Lord Cottenham referred to the two cases of *Colclough v. Evans* and *Crompton v. Wombwell*, and seemed to think that there was some inconsistency between them; but I think the real line of distinction between those two cases was very plain. In *Colclough v. Evans* the plaintiff amended his bill, but called it a supplemental bill. A demurrer was put in. The grounds upon which I allowed the demurrer were, that the thing called a supplemental bill was virtually an amendment, because it sought to state facts diametrically opposite to what had been stated in the original bill; and though it was reasonable to have the matter clearly stated upon the pleadings, yet, as the proper way for so doing was by amending the original bill, therefore I said I would not allow that thing called a supplemental bill to be made use of, when it was plain that it was a case for amendment. The second case, *Crompton v. Wombwell*, was the common case of a supplemental bill filed after the time at which amendment could be allowed. What the Lord Chancellor said in *The Attorney General v. The Fishmongers' Company*, does not at all prejudice the question.”

The reporter of the above case of *Pemberton v. Walford* quotes Lord Cottenham's words—“*If that is to be done by supplemental bill which might be done by amendment, the Court would require as much strictness as it would require for the purpose of amendment, if leave were required (f)*”—as deciding that the leave of

(e) *Supra*, p. 13.

(f) 4 Myl. & Cr. 9.

the Court is necessary for filing the supplemental bill, in opposition to Sir Lancelot Shadwell's opinion. But he surely misapprehends His Lordship's meaning. The words "*if leave were required*" over-ride the whole sentence, and not merely the latter part of it. With submission, His Lordship's meaning is simply this ;— "I avoid the question as to leave; for, if leave were required, the supplemental bill would require as much strictness as the amendment: therefore we have this alternative;—if leave *is not* required, no order is necessary;—and if leave *is* required, the motion is too general."

Amendment
and Supple-
mental Bill.

The doctrine laid down in a former passage (*g*), that such part of a bill of revivor and supplement as is a bill of revivor, is distinct from such part as is a bill of supplement, is confirmed by the recent case of *Egremont v. Cowell* (*h*). In that case, on a motion by the defendant to discharge the usual order for revivor, which had been obtained upon the filing of a bill of revivor and supplement, on the ground that the new suit ought to have been brought to a decree, Lord Langdale, M. R., held that the course which had been adopted was the proper one; namely, that of reviving the suit by the common order, and then proceeding to take a decree upon the supplemental matter.

Bill of Revi-
vor and Sup-
plement.

We have seen (*i*) that where a suit abates by the death or marriage of a sole plaintiff, the new plaintiff must revive against *all* the defendants. To this we may add, that even if the bill has been taken *pro confesso*, by order, against any defendant, such defendant must nevertheless be made a party to the revivor suit, in order that the new plaintiff may obtain

Abatement
after bill taken
pro confesso.

(*g*) *Supra*, p. 99.

(*h*) Rolls, May 5, 1843.

(*i*) *Supra*, pp. 111, 131.

Abatement
after Bill taken
pro confesso.

Administrator
de bonis non.

the benefit of the order for taking the bill *pro confesso* (*k*).

We have seen that where a personal representative, a defendant in a suit, dies, and his personal representative is not the personal representative of the original testator, the suit is revived against the administrator *de bonis non* of the original testator (*l*). Under these circumstances it has been decided, that the personal representative of the first personal representative is not a necessary party to the suit, and therefore ought not to be brought before the Court, either by bill of revival, or by any other process, because the right to call upon him for an account of the first personal representative's assets, falls, not upon the plaintiff, but upon the administrator *de bonis non* (*m*).

(*k*) *Marten v. Whichelo*, 1841, 1 Cr. & Phil. 257, 259.

(*m*) *Phelps v. Sproule*, 1831, 4 Sim. 321.

(*l*) *Vide supra*, p. 153.

APPENDIX
OF
PRECEDENTS.

PRECEDENTS.



- I. *Supplemental Bill to introduce New Matter which existed at the Time of Filing the Original Bill.*
—Vide Chap. II.

IN CHANCERY.

To the Right Honorable, &c.

Humbly complaining, sheweth unto your Lordship your orator Peter Barnes of &c., that on or about &c. your orator exhibited his original bill of complaint in this Honorable Court against John Willis, the defendant hereinafter named, as defendant thereto, *thereby stating* a certain memorandum of agreement, dated the 5th day of July 1839, and made between Edward Willis therein described of the one part, and your orator of the other part, and signed by the said Edward Willis, whereby the said Edward Willis agreed to sell to your orator a certain freehold close called &c., therein particularly described, and of which the said Edward Willis was seised in fee, for the sum of £560; *And further stating* the delivery by the said Edward Willis of the abstract of his title, and the acceptance of such title by your orator; *And further stating* the death of the said Edward Willis intestate, and that he left the said John Willis his only son and heir at law; and that letters of administration of the estate and effects of the said Edward Willis had been granted to the said John Willis by the Prerogative

I. Supplemental Bill.

Original bill by a purchaser for specific performance by the heir of the vendor.

I. Supple-
mental Bill.

Court of Canterbury; *And further stating* applications on the part of your orator to the said John Willis to perform the said agreement so entered into by his father as aforesaid, and his refusal to do so; *And charging* that the said close called &c. formed part of a considerable estate called Heseltine, the whole of which had, before the date of the said contract for sale, been mortgaged by the said Edward Willis to one John Saunders for £12,000, which mortgage debt was still due and owing; *And charging* that the said Edward Willis would, if living, be bound to redeem the said mortgage, in order to convey the said close to your orator free from incumbrances, and that the said John Willis was bound to do so to the extent of his father's assets, which your orator charged were amply sufficient for the same; *And praying* that the said John Willis might be decreed specifically to perform the said agreement so entered into by the said Edward Willis as aforesaid, and to convey, and procure all proper parties to join in conveying, the said close comprised in the said agreement to your orator, or as he should direct, upon your orator paying to the said John Willis the sum of £560, which your orator thereby offered to do, and in all respects to perform the said agreement on your orator's part; and in case the said John Willis should not admit assets of his said father, sufficient to enable him to perform the said agreement, then that the usual accounts of the real and personal estate of the said Edward Willis might be taken; and that your orator might have such further or other relief in the premises as the circumstances of his case might require, and to your Lordship should seem meet.

Appearance
and answer,
alleging a prior

And your orator further sheweth that the said John Willis, being duly served with process, appeared to

your orator's said bill, and put in his answer thereto, whereby he alleged, among other things, that he could not perform the said agreement of the 5th day of July 1839, without first redeeming the said mortgage so made to the said John Saunders as aforesaid, and that the assets of the said John Willis were not sufficient to enable him so to do.

I. Supplemental Bill.
mortgage on the property.

And your orator further sheweth that the said answer has been replied to by your orator, and witnesses have been examined on both sides, but publication has not yet passed; as by the said bill and proceedings, now remaining as of record in this Honorable Court, reference being had thereto, will appear.

Replication, &c.

And your orator further sheweth, by way of supplement, that your orator has lately, and since the examination of witnesses in the said cause, discovered, as the fact is, that the said John Saunders now is, and always since the date of the said agreement has been, ready and willing to concur in conveying the said close to your orator, discharged from his said mortgage, upon receiving your orator's purchase money in discharge, *pro tanto*, of the said mortgage debt.

Supplemental matter: that mortgagee is willing to join in conveying.

And your orator charges that such information was first given to your orator by means of a letter addressed by the said John Saunders to Mr. Luke, your orator's solicitor, and dated &c., part of which was in the words and figures following, that is to say;—"Mr. Willis's refusal to carry into effect his agreement with Dr. Barnes is unaccountable to me, because he knows that I have always been willing, and even desirous, to confirm the sale, and to release the premises from my mortgage on receiving the £560 towards my debt. This in fact was understood between his father and myself at the time when the sale to

Discovery of the supplemental matter.

1. Supple-
mental Bill.
Charges.

Dr. Barnes was made;" as by such letter, reference being had thereto, will more fully appear.

And your orator charges therefore that it is unimportant whether the said John Willis has assets of his father sufficient to redeem the mortgage debt so due to the said John Saunders as aforesaid, inasmuch as the said John Saunders is willing to be partially redeemed, and the purchase money of your orator is sufficient for that purpose.

And your orator charges that the said John Willis ought to be decreed to join with the said John Saunders, (whose concurrence your orator undertakes to procure,) in conveying the said close to your orator, upon payment by your orator of the said sum of £560 to the said John Saunders, in part discharge of his said mortgage debt.

Calls for
answer.

To the end therefore that the said defendant may, if he can, shew why your orator should not have the relief hereby prayed, and may upon his corporal oath, according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written he is required to answer; that is to say;—

1. Whether on or about &c. or at some other and what time, your orator did not exhibit his original bill of complaint in this Honorable Court against such person, and of or to such purport or effect, as hereinbefore in that behalf stated, or against some other and what person, and of or to some other and what purport or effect, or how otherwise.

2. Whether thereupon such proceedings were not had in the said cause as are hereinbefore in that behalf stated, or how otherwise.

3. Whether your orator has not, and whether not lately, and whether not since the examination of witnesses in the said cause, or at some other and what period, discovered, and whether it is not the fact, that the said John Saunders now is, and whether not that he always since the date of the said agreement has been, ready and willing to concur in conveying the said close to your orator, discharged from his said mortgage, upon receiving your orator's purchase money in discharge *pro tanto* of the said mortgage debt, or how otherwise.

4. Whether such information was not first given to your orator by means of such letter as hereinbefore in that behalf stated, or some other and what letter, or by some other and what means, or how otherwise, and when was such information first given to your orator.

5. Whether such letter as is hereinbefore mentioned to bear date &c. was not addressed by such person to such person, and whether it was not of such date, and partly in such words and figures, or of or to such purport or effect, as hereinbefore in that behalf stated, or addressed by some other and what person or persons, to some other and what person or persons, of some other and what date, and (with respect to the part thereof hereinbefore in that behalf mentioned) in some other and what words and figures, or of or to some other and what purport or effect, or how otherwise.

6. Whether it is not, and whether not for the reasons hereinbefore in that behalf given, unimportant, for the purposes of these suits, whether the said defendant has assets of his father sufficient to redeem the said mortgage debt, or how otherwise.

7. Whether the said defendant ought not to be decreed to join with the said John Saunders in such conveyance as hereinbefore in that behalf stated, or

I. Supple-
mental Bill.

in some other conveyance of the same nature, upon such payment by your orator as hereinbefore in that behalf mentioned, or some other and what payment, or how otherwise ; and, if not, why not.

Prayer.

And that your orator may have the same relief against the said defendant, as he might have had if the facts hereinbefore stated and charged by way of supplement had been stated in your orator's said original bill. And in case the said defendant shall continue to allege that he has not assets of the said Edward Willis, sufficient for the redemption of the mortgage debt so due to the said John Saunders as aforesaid, then that he may be decreed to join with the said John Saunders in conveying the said close comprised in the said agreement of the 5th day of July 1839, unto your orator and his heirs, or as he shall direct, upon your orator paying to the said John Saunders the said purchase money or sum of £560 towards discharge of the said mortgage debt ; your orator hereby offering to pay such sum, and in all respects to perform the said agreement of the 5th day of July 1839 on his part, and also undertaking to procure the concurrence of the said John Saunders in such conveyance as aforesaid ; and that your orator may have such further or other relief in the premises as the circumstances of his case may require, and to your Lordship shall seem meet ; May it please &c. [subpœna against John Willis].

The defendant is required to answer all the above interrogatories.

II. *Supplemental Bill against New Parties who ought to have been made Defendants to the Original Bill.*—*Vide Chap. II.*

IN CHANCERY.

To the Right Honorable, &c.

Humbly complaining sheweth unto your Lordship your orator Ferdinand Hartwell of &c. that on &c. your orator exhibited his original bill of complaint in this Honorable Court, which was afterwards amended by an order of this Court, and which bill so amended was against Timothy Naylor as defendant thereto; *thereby stating* an Indenture dated the 1st day of February 1809, and made between your orator of the one part, and the said Timothy Naylor of the other part, whereby, in consideration of the sum of £7000 to your orator lent and advanced by the said Timothy Naylor, your orator demised certain freehold hereditaments in the county of Salop therein described unto the said Timothy Naylor, his executors, administrators, and assigns, for a term of five hundred years, at a peppercorn rent, subject nevertheless to redemption on payment by your orator, his heirs, executors, administrators, or assigns, unto the said Timothy Naylor, his executors, administrators, or assigns, of the sum of £7000, with interest for the same after the rate of five per cent. per annum, on the 1st day of August 1809; *And further stating* that the said sum of £7000 was not paid on the day so appointed for that purpose as aforesaid, and that subsequently the said Timothy Naylor entered into the receipt of the rents and profits of the said hereditaments, and had thereby long since paid himself the whole of the said mortgage debt and interest; *And praying* that an account might be taken, under the direction of this

II. Supplemental Bill. ^c

Original bill for redemption of a mortgage.

11. Supple-
mental Bill.

Honorable Court, of the rents and profits of the said hereditaments received by the said Timothy Naylor since he so entered into the receipt thereof as aforesaid, or by any person or persons by his order or for his use; and also an account of the interest which accrued from time to time on the said sum of £7000, or on so much thereof as from time to time remained due; and that, after deducting from time to time such interest from the rents and profits so received as aforesaid, the residue of such rents and profits might be considered as having been received from time to time in or towards discharge of the said principal sum of £7000; and that it might be ascertained whether the same had been wholly satisfied, or whether anything, and what, remained due in respect thereof; and that the said Timothy Naylor might be decreed to assign or surrender the hereditaments so demised to him as aforesaid, unto your orator, or as he should direct, and to deliver to him all deeds, papers, and writings, in his custody or power, relating thereto, upon your orator paying to the said Timothy Naylor what, if anything, should be found to be still due on account of the said mortgage, which your orator thereby undertook to do; and in case, on taking the said account, it should be found that the said Timothy Naylor had been overpaid, then that the said Timothy Naylor might be decreed to pay to your orator the surplus received by him beyond his said mortgage debt and the interest thereof; and that your orator might have such further or other relief in the premises as the circumstances of his case might require, and to your Lordship should seem meet.

And your orator further sheweth unto your Lordship, that the said Timothy Naylor, being duly served with process, appeared to your orator's said bill, and put in his answer thereto, which being replied to, wit-

nesses were examined, and publication passed, but the cause has not yet been heard; as by the said bill and proceedings, now remaining as of record in this Honorable Court, on reference thereto will more fully appear.

II. Supplemental Bill.

And your orator further sheweth, by way of supplement, that your orator has lately discovered, as the fact is, that by an Indenture bearing date the 29th day of April 1812, and made between the said Timothy Naylor of the first part, Cecilia Dering, Spinster, since deceased, of the second part, and Henry Hurrill and William Sketchley, two of the defendants hereinafter named, and Charles Hurrill Dering, since deceased, of the third part (being the settlement made in consideration of a marriage then intended, and afterwards solemnized, between the said Timothy Naylor and Cecilia Dering) the said Timothy Naylor assigned the said principal sum of £7000, and the interest to accrue due thereon, unto the said Henry Hurrill, William Sketchley, and Charles Hurrill Dering, their executors, administrators, and assigns, absolutely; and he also assigned the said hereditaments so demised to him by the said Indenture of the 1st day of February 1809, as aforesaid, unto the said Henry Hurrill, William Sketchley, and Charles Hurrill Dering, their executors, administrators, and assigns, for all the then residue of the said term of five hundred years therein, subject nevertheless to such equity of redemption as the same were then subject to under the said last mentioned Indenture. And it was thereby declared that the said Henry Hurrill, William Sketchley, and Charles Hurrill Dering, their executors, administrators, and assigns, should stand possessed of the said principal sum of £7000, and the interest to accrue thereon, and the securities for the

Supplemental matter.

Discovery of an assignment of the mortgage debt by the mortgagee, on his marriage.

**II. Supple-
mental Bill.**

same, in trust for the said Timothy Naylor, his executors, administrators, and assigns, until the said then intended marriage should be solemnized; and from and after the solemnization thereof, upon the trusts thereafter declared, and in part hereinafter stated, that is to say;—upon trust to pay the interest of the said sum of £7000 to the said Timothy Naylor during his life; and after his death, upon trust to pay such interest to the said Cecilia Dering during her life; and after the decease of the survivor of them the said Timothy Naylor and Cecilia Dering, upon trust to pay and divide the said principal sum of £7000 to, and equally among, all the children of the said then intended marriage, who being sons should attain the age of twenty-one years, or being daughters should attain that age or be married, or their respective executors, administrators, or assigns; as by such Indenture of settlement, on reference thereto, will more fully appear.

Issue of the
marriage.

And your orator further sheweth, by way of supplement, that there were issue of the said marriage two children only, that is to say, Charles Naylor and Cecilia Naylor, two of the defendants hereinafter named, both of whom have attained the age of twenty-one years; and that the said Cecilia Dering departed this life on the 15th day of June 1816, and that the said Charles Hurrill Dering departed this life on the 20th day of December 1829.

The trustees
and issue are
necessary parties.

And your orator charges that the said Henry Hurrill, William Sketchley, Charles Naylor, and Cecilia Naylor, are, by the means aforesaid, interested in the said sum of £7000, and the securities for the same, and are necessary parties to this suit, and that your orator is entitled to have the same relief from his said original bill, as if they had been made parties thereto.

To the end therefore that the said defendants may, if they can, shew why your orator should not have the relief hereby, and by his said original bill (a) prayed, and may upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories in your orator's said original bill numbered and set forth, and also to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say;—

II. Supplemental Bill.
Calls for answer to both bills.

1. Whether &c.

And that your orator may have the same relief from his said original bill, as if the said defendants had been made parties thereto; and that the said defendants may concur in the assignment or surrender thereby prayed; and that your orator may have such further or other relief in the premises as the nature of his case may require, and to your Lordship shall seem meet; May it please &c. [subpœna for appearance and answer to both bills against Henry Hurrill, William Sketchley, Charles Naylor, and Cecilia Naylor].

The defendants are required to answer the interrogatories in the original bill numbered respectively &c. and all the above interrogatories.

(a) These words should be inserted when the supplemental bill calls for an answer to the original bill.

III. *Supplemental Bill against the Representative of a Defendant to the Original Bill, who had died before Appearance; and against whose Representative therefore the Suit could not be revived.*
—*Vide Chap. II.*

IN CHANCERY.

To the Right Honorable &c.

III. Supplemental Bill.
Original bill against executors for an account.

Humbly complaining sheweth unto your Lordship your orator John Francis Perry of &c. that on or about the 18th day of June 1841, your orator exhibited his original bill of complaint in this Honorable Court, which was afterwards amended by an order of this Court, and which bill so amended was against Anthony Beaumont, and against Charles Tyler when he should come within the jurisdiction of this Court; *thereby stating* the will of Charles Sheppard, whereby he bequeathed unto the said Anthony Beaumont, whom he appointed executor, all his stocks and funds upon trust to pay the interest thereof to Rose Perry, so long as she remained unmarried; and, after her death or marriage, to transfer the same to the said Charles Tyler; but, in case she should die without having been married, that the said Anthony Beaumont should transfer the same to such person or persons as she should appoint; and, in default of appointment, to her next of kin; and he gave the residue of his property to his executor upon the same trusts: *And further stating* the death of the said testator, and the probate of his will by the said Anthony Beaumont, and the death of the said Rose Perry without ever having been married, and without having made any appointment of the property so bequeathed as aforesaid. and that she left

your orator her only brother and sole next of kin ; *and praying* that it might be declared by this Court that your orator, as sole next of kin of the said Rose Perry, was absolutely entitled to the residuary personal estate of the said Charles Sheppard deceased ; and that an account might be taken under the direction of this Court of the personal estate of the said Charles Sheppard, and the application thereof, and of his debts and funeral and testamentary expenses ; and that the clear residue thereof might be ascertained ; and that the said defendant Anthony Beaumont might be decreed to pay, transfer, or assign to your orator, as well such clear residue, as also the interest or dividends which had accrued thereon since the death of the said Rose Perry ; and that for the purposes aforesaid all necessary inquiries might be made, and accounts taken ; and that your orator might have such further or other relief in the premises as the circumstances of the case might require, and to your Lordship might seem meet.

III. Supplemental Bill.

And your orator further sheweth that the said Anthony Beaumont, being duly served with process, appeared to your orator's said bill, and put in his answer thereto, which answer was replied to.

Appearance, &c. of one of the defendants.

And your orator further sheweth that the said cause came on to be heard before His Lordship the Master of the Rolls, on the 31st day of May 1842, when His Lordship was pleased to order and decree that it should be referred to the Master of this Court in rotation to inquire and state to the Court, whether the defendant Charles Tyler was out of the Jurisdiction of this Court at the time when the bill in this cause was filed ; and if so, whether he had ever since continued, and whether he was then, out of such Jurisdiction ; and it was ordered that the said Master

Decree.

III. Supplemental Bill.

should also inquire and state, whether the said Rose Perry was living or dead; and, if dead, when she died; and who was or were her personal representative or representatives; and who was or were her next of kin living at the time of her death; and whether her next of kin was or were respectively living or dead; and who was or were then the personal representative or representatives respectively of such next of kin (if any) as might be dead; and if the said Master should find that all proper parties were before the Court as parties to that suit, then it was ordered that he should proceed to inquire and state whether the said Rose Perry ever and when intermarried with any person and whom; and in case he should find that she did not intermarry with any person, then it was ordered that he should inquire and state whether she ever and when made any and what appointment of the stocks and funds specifically bequeathed by the said will of the said testator, and of the residuary personal estate of the said testator, or of either and which of them, or of any and what part thereof respectively; and for the better discovery of the matters aforesaid the parties were to produce before the said Master, upon oath, all books, papers, and writings in their custody or power relating thereto, and were to be examined upon interrogatories as the said Master should direct; and the said Master was to be at liberty to state any special circumstances as he should think fit; and His Lordship reserved the consideration of all further directions, and of the costs of that suit, until after the said Master should have made his report; and any of the parties were to be at liberty to apply to this Court as occasion should require.

Further proceedings.

And your orator further sheweth that divers pro-

ceedings have been had before the Master to whom the said cause was so referred as aforesaid, but he has yet made no report thereon ; as by such bill and proceedings, now remaining as of record in this Honorable Court, when produced will more fully appear.

III. Supplemental Bill.

And your orator further sheweth *by way of supplement*, that your orator has lately discovered, as the fact is, that the said Charles Tyler departed this life in the Kingdom of France, on the 2nd day of July 1841, without ever having been served with process to your orator's said bill, or having appeared thereto.

Supplemental matter.
Death of one defendant without appearance.

And your orator further sheweth *by way of supplement*, that the said Charles Tyler died intestate ; and that on the 1st day of June 1842 letters of administration of the estate and effects of the said Charles Tyler were granted by the Prerogative Court of Canterbury to Thomas Henry Webster the defendant hereto ; as by such letters of administration when produced will more fully appear.

Administration taken out to him.

And your orator charges that by the means aforesaid the said Thomas Henry Webster has become, and now is, the legal personal representative of the said Charles Tyler, and is entitled to all such interest, if any, as the said Charles Tyler had under the said will of the said Charles Sheppard.

And your orator charges that your orator ought to have the same relief against the said Thomas Henry Webster, as the personal representative of the said Charles Tyler, and the same benefit of the said suit and all the proceedings therein, as he might have had against the said Charles Tyler, if he had appeared to your orator's said bill, and were now living.

Claims benefit of former proceedings.

To the end, therefore, that the said Thomas Henry Webster may, if he can, shew why your orator should not have the relief hereby, and by his said original

Calls for answer to both bills.

III. Supple-
mental Bill.

bill (*a*), prayed ; and that he may upon his corporal oath, according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories in the said original bill numbered and set forth, as by the note thereunder written the said Charles Tyler was required to answer, and also to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written this defendant is required to answer ; that is to say,—

I. Whether, &c.

Prayer.

And that it may be declared by this Honorable Court that your orator is entitled to have the same relief against the said defendant, as such personal representative of the said Charles Tyler, and the same benefit of the said original suit, and of all the proceedings therein, as he might have had against the said Charles Tyler, if he had appeared to your orator's said bill, and were now living ; and that it may be decreed accordingly ; and that your orator may have such further or other relief in the premises as the circumstances of his case may require, and to your Lordship may seem meet ; May it please &c. [subpœna for appearance and answer to both bills, against Thomas Henry Webster.]

The defendant is required to answer all the above interrogatories.

NOTE.—It may be thought that conformably with the doctrines laid down in the second chapter of this work, Beaumont ought to have been made a defendant to this supplemental bill, as he is interested in the question who is the legatee under his testator's will. But it will be observed that that doctrine applies only

(*a*) These words should be inserted when the supplemental bill calls for an answer to the original bill.

to a bill filed against a defendant whose interest was never represented in the original bill. Here, though Webster was *personally* a new defendant, he represented the interest before represented by Tyler; and Beaumont had already had an opportunity, in his answer to the original bill, of making any statement relative to that interest which he might have thought proper. In fact, this bill corresponds in character with a bill of revivor, to which Beaumont would assuredly not have been a party.

III. Supplemental Bill.

IV. *Petition for Leave to File a Supplemental Bill in the Nature of a Bill of Review.*—*Vide Chap. III.*

IN CHANCERY.

Between RICHARD MALINS, *Complainant*,
and
THOMAS BENCHER, *Defendant*.

To the Right Honorable the Master of the Rolls.

The humble petition of the above named defendant, Thomas Bencher,

Sheweth,

That on or about &c. the above-named complainant Richard Malins being seised in fee, or otherwise well entitled, of or to a certain dwelling-house, land, and other hereditaments situate in the parish of G. in the county of Wilts, by a memorandum in writing bearing date the 24th day of March 1840, and made between the said Richard Malins of the one part and your petitioner of the other part, and signed by the said Richard Malins and your petitioner, contracted to sell to your

IV. Petition for Leave to File a Supplemental Bill in the Nature of a Bill of Review.

Agreement by petitioner to purchase an estate.

IV. Petition
for Leave to
File a Supple-
mental Bill in
the Nature of
a Bill of
Review.

petitioner, and your petitioner by the same memorandum contracted to purchase, the said dwelling-house, land, and other hereditaments, for the sum of £1200, the purchase to be completed on the 24th day of June then next ensuing, on a good title being shewn.

Title disap-
proved of.

That the said Richard Malins delivered to your petitioner an abstract of his title to the said hereditaments, which was submitted to the perusal of Counsel by your petitioner, and was disapproved of by the said Counsel, and that your petitioner accordingly refused to complete the said purchase.

Bill for specific
performance.

That on or about &c. the said Richard Malins exhibited his original bill of complaint in this Honorable Court, against your petitioner as defendant thereto, thereby stating to the effect hereinbefore stated, and praying that the said agreement contained in the said memorandum of the 24th day of March 1840 might be specifically performed, by and under the direction and decree of this Honorable Court, and that your petitioner might be decreed to pay to the said Richard Malins the said sum of £1200, with interest from the said 24th day of June 1840, the said Richard Malins being willing and thereby offering to execute to your petitioner a proper conveyance of the said hereditaments; and that the said Richard Malins might have such further or other relief in the premises as the nature of his case might require, and to your Lordship should seem meet.

Appearance
and answer of
petitioner.

That your petitioner, being duly served with process, appeared and put in his answer to the said original bill, and thereby denied that the said Richard Malins had shewn, or was able to shew, a good title to the said premises, and submitted that your petitioner was not bound to perform the said contract.

That such answer was replied to, and witnesses examined on both sides, and publication passed.

That the said cause being at issue came on to be heard before your Lordship on &c. when your Lordship was pleased to order and decree that it should be referred to the Master of this Court in rotation, to inquire and state to the Court, whether the said Richard Malins could make a good title to the premises comprised in the said agreement of the 24th day of March 1840, and if so, when such good title was first shewn; and for the better discovery of the matters aforesaid, the parties were to produce before the said Master, upon oath, all deeds, papers, and writings in their custody or power relating thereto, and were to be examined upon interrogatories as the said Master should direct; and your Lordship reserved the consideration of further directions, and of the costs of the suit, until after the said Master should have made his report; and all parties were to be at liberty to apply to the Court as they should be advised.

IV. Petition for Leave to File a Supplemental Bill in the Nature of a Bill of Review.

Replication, &c.
Decree.

That in pursuance of the said decree, the Master to whom the said cause was referred made his report therein bearing date &c. which was afterwards duly confirmed by an Order of this Court; and he thereby found that the said Richard Malins could make a good title to the said premises, and that such good title was first shewn on the 12th day of April 1840.

Master's report.

That the said cause came on to be heard for further directions and costs, before your Lordship on &c. when your Lordship was pleased to declare that the agreement contained in the said memorandum of the 24th day of March 1840 ought to be specifically performed and carried into execution. And it was ordered that it should be referred to the said Master to compute interest at the rate of four per cent. per annum on the

Decree on further directions.

IV. Petition
for Leave to
File a Supple-
mental Bill in
the Nature of
a Bill of
Review.

said sum of £1200 from the said 24th day of June 1840, and to add such interest to the said principal sum. And it was referred to the said Master to tax the said Richard Malins his costs of the said suit, and to certify the amount thereof. And it was ordered that your petitioner should pay to the said Richard Malins the amount of principal and interest to be so certified as aforesaid, and also the costs to be so taxed as aforesaid, upon the said Richard Malins executing and delivering to your petitioner, at the expense of your petitioner, a proper conveyance of the premises comprised in the said agreement, such conveyance to be settled by the said Master, if the parties should differ about the same. And all parties were to be at liberty to apply to the Court as they should be advised.

Proceedings in
Master's Office
still pending.

That in pursuance of such last mentioned order some proceedings have been had in the said Master's Office, and the same are still pending and have not yet been finally concluded.

Foundation of
the plaintiff's
title.

That the said Richard Malins claimed to be seised of, or entitled to, the said premises as heir at law of his late uncle John Henry Malins deceased, and in no other capacity, and he deduced his title before the said Master accordingly, and satisfied the said Master that he was such heir at law; and your petitioner was not then able, from any knowledge or information then in his power, to controvert such claim.

Discovery of a
flaw in the
title.

That your petitioner hath since the making of the said decree on further directions, discovered, as the facts are, that on or about &c. the said John Henry Malins intermarried with Mary Ann Temple, spinster, and that there was issue of such marriage three sons and one daughter, namely, John Temple Malins, Henry Malins, George Malins, and Mary Malins, all

of whom are now alive and residing in the United States of America; and that the said John Temple Malins is the rightful heir at law of the said John Henry Malins; and that the said Richard Malins was not nor is such heir at law.

IV. Petition for Leave to File a Supplemental Bill in the Nature of a Bill of Review.

That the said report of the said Master, and the decree on further directions so founded thereon as aforesaid, are consequently erroneous, and that your petitioner is aggrieved by the said decree on further directions.

The decree on further directions was erroneous.

That the said decree has not been signed and enrolled, and your petitioner intends to present a petition to your Lordship for the purpose of having the said cause reheard for further directions and costs.

Decree not signed and enrolled.

Your petitioner, therefore, most humbly prays your Lordship that he may be at liberty to exhibit a supplemental bill in the nature of a bill of review in the said cause, to the intent that your petitioner may have in the said cause the same benefit of the circumstances so lately discovered by him as aforesaid as he would have had in case the same had been set forth by way of defence in his said answer to the said complainant's bill in the said cause.

And your petitioner &c.

V. *Affidavit in Support of a Petition for Leave to File a Supplemental Bill in the Nature of a Bill of Review.—Vide Chap. III.*

IN CHANCERY.

Between RICHARD MALINS, *Complainant*.

and

THOMAS BENCHER, *Defendant*.

V. Affidavit.

Thomas Bencher, the defendant, maketh oath, and saith, that since the time of pronouncing the decree in this cause, he, this deponent, hath discovered a new matter of consequence in the said cause; particularly that John Henry Malins deceased, the uncle of the said complainant, of whom the complainant claims to be heir at law, left three sons and one daughter him surviving, named respectively John Temple Malins, Henry Malins, George Malins, and Mary Malins; and that such sons and daughter are still alive and residing in the United States of America; and that the said John Temple Malins is the rightful heir at law of the said John Henry Malins; which new matter this deponent did not know, and could not by reasonable diligence have known, so as to make use thereof in his defence, at the time of pronouncing the said decree.

Sworn, &c.

THOMAS BENCHER.

VI. *Order for Leave to File a Supplemental Bill in the Nature of a Bill of Review.*—*Vide Chap. III.*

IN CHANCERY.

Between RICHARD MALINS, *Complainant.*

and

THOMAS BENCHER, *Defendant.*

Whereas the above named defendant Thomas Bencher did on &c. prefer his petition unto the Right Honorable the Master of the Rolls, setting forth That &c. [set forth the petition fully;] whereupon all parties concerned were ordered to attend His Lordship on the matter of the said petition; and Counsel for the petitioner and for the plaintiff this day attending accordingly; upon hearing of the said petition, the decree dated &c. [the proceedings in the cause,] the affidavit of &c. read; and what was alleged by the Counsel for the said petitioner and for the plaintiff; His Lordship doth order that on the petitioner Thomas Bencher depositing the sum of £50 with the registrar, he be at liberty to file a supplemental bill in the nature of a bill of review touching the several matters in the said petition mentioned, and for relief in the premises as he may be advised.

VI. Order for
Leave to File
Bill.

VII. *Petition for Rehearing a Cause on Supplemental Matter.—Vide Chap. III.*

IN CHANCERY.

Between RICHARD MALINS, *Complainant*.
and
THOMAS BENCHER, *Defendant*.

To the Right Honorable the Master of the Rolls.

The humble petition of the above named defendant Thomas Bencher,

Sheweth,

VII. Petition for Rehearing.

The decree on further directions.

Proceedings in the Master's Office still pending.

Decree was erroneous.

Decree is not signed and enrolled.

Petition to file supplemental bill in the nature of a bill of review.

That by the decree on further directions made in this cause on &c. your Lordship was pleased to declare that the agreement contained in the memorandum of the 24th day of March 1840, in the pleadings in this cause mentioned, ought to be specifically performed &c. [as in the former petition.]

That in pursuance of the said last mentioned order some proceedings have been had in the said Master's Office, and the same are still pending, and have not yet been finally concluded.

That the said decree on further directions was erroneous, and your petitioner is aggrieved thereby, and is entitled to have the same reviewed and reversed.

That the said decree has never been signed and enrolled.

That on &c. your petitioner presented his petition in this cause to your Lordship, stating as therein is stated, and praying for leave to file a supplemental bill in the nature of a bill of review respecting the matters in this cause.

That by an order of this Court bearing date &c. your Lordship was pleased to order that on your petitioner depositing the sum of £50 with the Registrar, your petitioner should be at liberty to file a supplemental bill in the nature of a bill of review touching the several matters in the said petition mentioned, and for relief in the premises as your petitioner might be advised.

VII. Petition
for Rehearing.
Order for leave.

That if your Lordship should think fit to accede to the prayer of this petition, your petitioner intends to file a supplemental bill in the nature of a bill of review touching the matters in this cause.

Intention to
file the bill.

Your petitioner, therefore, most humbly prays that your Lordship will be pleased to order that this cause may be reheard; and that the said decree of &c. may be reviewed and reversed; and that your Lordship will be pleased to order that the said cause may come on at the same time as the supplemental cause so intended to be instituted by your petitioner as aforesaid.

And your petitioner, &c.

We humbly conceive that this cause is proper to be reheard touching the matter in the petition mentioned, if your Lordship shall think fit.

A. B. }
C. D. } Counsel's signatures.

VIII. *Supplemental Bill in the Nature of a Bill of Review.—Vide Chap. III.*

IN CHANCERY.

To the Right Honorable &c.

VIII. Supplemental Bill in the Nature of a Bill of Review.

Original bill by vendor for specific performance.

Humbly complaining sheweth unto your Lordship your orator Thomas Benchet of &c. that on or about &c. Richard Malins, the defendant hereinafter named, exhibited his original bill of complaint in this Honorable Court, against your orator as defendant thereto, *thereby stating*, among other things, a memorandum in writing bearing date the 24th day of March 1840, and made between the said Richard Malins of the one part and your orator of the other part, and signed by the said Richard Malins and your orator, whereby the said Richard Malins contracted to sell to your orator, and your orator contracted to purchase, a certain dwelling-house, with land and other hereditaments, situate in the parish of G. in the county of Wilts, and therein particularly described, for the sum of £1200, the purchase to be completed on the 24th day of June then next ensuing, on a good title being shewn; *And further stating* the delivery by the said Richard Malins to your orator of an abstract of his title to the said hereditaments, and that he had thereby shewn a good title thereto, and had frequently applied to your orator, and requested him to complete the said contract, and to pay the said sum of £1200, but that your orator had refused to comply with such applications and requests; *And praying* that the said agreement contained in the said memorandum of the 24th day of March 1840 might be specifically performed by and under the direction and decree of this Honorable

Court, and that your orator might be decreed to pay to the said Richard Malins the said sum of £1200 with interest from the said 24th day of June 1840, the said Richard Malins being willing, and thereby offering, to execute to your orator a proper conveyance of the said hereditaments; And that the said Richard Malins might have such further or other relief in the premises as the nature of his case might require, and to your Lordship should seem meet.

VIII. Supplemental Bill in the Nature of a Bill of Review.

And your orator further sheweth, that your orator, being duly served with process, appeared and put in his answer to the said original bill, and thereby denied that the said Richard Malins had shewn, or was able to shew, a good title to the said premises, and submitted that your orator was not bound to perform the said contract.

Appearance and answer.

And your orator further sheweth that such answer was replied to, and that witnesses were examined on both sides, and publication passed.

Replication, &c.

And your orator further sheweth that the said cause being at issue came on to be heard before the Right Honorable the Master of the Rolls on &c. when his Lordship was pleased to order and decree &c. [as in the petition.]

Decree.

And your orator further sheweth that, in pursuance of the said decree, the Master to whom &c. [as in the petition.]

Master's report.

And your orator further sheweth that the said cause came on to be heard for further directions and costs &c. [as in the petition.]

Decree on further directions.

And your orator further sheweth that in pursuance of such last mentioned Order some proceedings have been had in the said Master's Office, and the same are still pending, and have not yet been finally concluded;

Proceedings in Master's Office.

VIII. Supplemental Bill in the Nature of a Bill of Review.

Supplemental matter.

as by such bill and other proceedings in the said cause, now remaining as of record in this Honorable Court, reference being had thereto, will more fully appear.

And your orator, by leave of this Honorable Court first had and obtained for that purpose, further sheweth by way of supplement, that the said Richard Malins claimed to be seised of or entitled to the said premises, as heir at law of his late uncle John Henry Malins deceased, and in no other capacity; and he deduced his title before the said Master accordingly, and satisfied the said Master that he was such heir at law. And your orator was not then able, from any knowledge or information then in his power, to controvert such claim. But your orator has since the making of the said decree on further directions discovered, as the facts are, that on or about &c. the said John Henry Malins intermarried with Mary Ann Temple, spinster; and that there was issue of such marriage three sons and one daughter, namely, John Temple Malins, Henry Malins, George Malins, and Mary Malins, all of whom are now alive and residing in the United States of America; and that the said John Temple Malins is the rightful heir at law of the said John Henry Malins, and that the said Richard Malins was not nor is such heir at law.

Error in the decree.

Petition of rehearing.

And your orator, by such leave as aforesaid, further sheweth, by way of supplement, that the said report of the said Master, and the decree on further directions so founded thereon as aforesaid, are consequently erroneous; and your petitioner is aggrieved thereby; and that the said decree has never been signed and enrolled; and that your orator has accordingly presented a petition to your Lordship praying

to have the said cause reheard before your Lordship for further directions and costs, which petition has been acceded to by your Lordship.

VIII. Supplemental Bill in the Nature of a Bill of Review.

And your orator, by such leave as aforesaid, further sheweth, by way of supplement, that your orator is entitled, as he is advised, to have the said cause, when so reheard as aforesaid, heard also on the new matter so discovered by your orator as aforesaid, in the same manner as if such new matter had been put in issue in the said original suit.

Claims a hearing on the new matter also.

To the end therefore that the said defendant may, if he can, shew why your orator should not have the relief hereby prayed; and may upon his corporal oath, according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written he is required to answer; that is to say;—

Calls for answer.

1. Whether &c.

And that the said cause may be heard on such new and supplemental matter as aforesaid, at the same time as it is reheard on the said original bill; and that your orator may have such further or other relief as, under the circumstances hereinbefore particularly stated, to your Lordship shall seem meet, and the nature of this case, as it hereby appears, may require; May it please &c. [subpoena against Richard Malins.]

Prayer.

The defendant is required to answer all the interrogatories.

IX. *Bill of Revivor against the Representatives of a Defendant to the Original Bill, who had died after Appearance but before Answer. It calls for an Answer to the Original Bill, as well as for an Answer to itself respecting Assets.—Vide Chap. VII.*

IN CHANCERY.

To the Right Honorable &c.

IX. Bill of
Revivor.
Original bill
for account.

Humbly complaining sheweth unto your Lordship your oratrix Mary Waller of &c. that on or about &c. your oratrix exhibited her original bill of complaint in this Honorable Court against David Barnes the younger and John Barnes Waller, thereby stating divers matters whereby it appeared that your oratrix and the said John Barnes Waller were, under and by virtue of a certain Indenture executed by David Barnes the elder deceased, and dated &c. and under and by virtue of his last will and testament dated &c. which was proved by the said David Barnes the younger in the Prerogative Court of Canterbury, entitled to the relief prayed by the said bill; and praying that your oratrix might be declared to be entitled to have the covenant contained in the said Indenture specifically performed; and that an account might be taken by and under the direction of this Honorable Court of the personal estate which the said testator was possessed of, interested in, or entitled to at the time of his death, and over which he had a disposing power; and particularly that the amount of the largest legacy given by his said will, whether pecuniary, specific, or residuary, might be ascertained; and that the personal estate of the said

testator might be disposed of in a due course of administration ; and in case it should appear that it was most beneficial for your oratrix to receive her share of the legacy of £4000 bequeathed by the said will of the said testator, then that the same might be paid to her ; and in case it should appear to be most beneficial for her to take the benefits secured to her by the said Indenture, then that the same might be made good to her out of the personal estate of the said testator ; and that all necessary directions might be given for enabling your oratrix to make her election between the legacy given by the said will and the benefits provided for her by the said Indenture, and that whatever she should be ultimately entitled to, might be paid to her ; and that your oratrix might have such further relief in the premises as the circumstances of her case might require, and to your Lordship should seem meet ; as in and by such original bill, now remaining as of record in this Honorable Court, reference being had thereto, will more fully appear.

IX. Bill of
Revivor.

And your oratrix further sheweth that the said David Barnes the younger appeared to the said bill ; but before he had answered, and before any further proceedings were had in the said cause, and on or about the 25th day of April now last past, the said David Barnes the younger died ; and that he made his will bearing date &c. and that he thereby appointed his wife Sarah Barnes and James Peters, the defendants hereinafter named, executrix and executor of his said will.

Appearance of
the deceased
defendant.

His death.

And your oratrix further sheweth that the said defendants Sarah Barnes and James Peters have both proved the said will of the said David Barnes the younger in the Prerogative Court of Canterbury, and have thereby become, and now are, the legal personal

His executors.

IX. Bill of Revivor.

representatives of the said David Barnes the younger, and also of the said David Barnes the elder; and they have possessed themselves of personal estate of the said David Barnes the elder, and David Barnes the younger, sufficient to answer your oratrix's demands in this suit.

The abatement.

And your oratrix further sheweth that by the death of the said David Barnes the younger the said suit became abated as to him, but your oratrix is advised that the same ought to be revived.

Calls for answer to both bills.

To the end therefore that the said defendants may, if they can, shew why your oratrix should not have the relief hereby, and by her said original bill (*a*), prayed, and may upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories in your oratrix's said original bill numbered and set forth, as by the note thereunder written the said David Barnes the younger was required to answer, and also to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say;—

1. Whether, &c.

Prayer for revivor.

And that the said defendants may, if they can, shew why the said suit and proceedings should not be revived against them, and, in default thereof, that they may be revived accordingly, and stand and be in the same plight and condition as they were in at the time

(*a*) In general a bill of revivor does not call for any answer. In this particular case it is necessary to call for an answer both to the original bill, on account of the death

of the former defendant before answer, and also to the bill of revivor, on account of the question as to the admission of assets.

of the said abatement; and that the said defendants may either admit assets of the said David Barnes the elder and David Barnes the younger, possessed by them, sufficient to answer your oratrix's demands in this suit, or otherwise that an account may be taken thereof in the usual manner; and that your oratrix may have the same relief against them as she might have had against the said David Barnes the younger, in case he had lived (*b*); May it please your Lordship to grant unto your oratrix Her Majesty's most gracious writ of subpoena to revive and answer, issuing out of and under the seal of this Honorable Court, to be directed to the said Sarah Barnes and James Peters, thereby commanding them, on a certain day and under a certain pain therein to be limited, personally to be and appear before your Lordship in this Honorable Court, and then and there to answer your oratrix's said original bill, and also the premises, and to shew cause, if they can, why the said suit and proceedings therein had, should not stand and be revived against them, and be in the same plight &c. [as above] and further to stand to, and abide, such order and decree as to your Lordship shall seem meet. And your oratrix shall ever pray &c.

IX. Bill of Revivor.

And for admission of assets, or for an account.

Prayer for subpoena.

The defendants are required to answer all the above interrogatories.

(*b*) The bill of revivor does not ask for further relief.

X. Order for Revivor.—*Vide Chap. VII.*

IN CHANCERY.

JAMES LUPTON, &c., *Plaintiffs.*ELIZABETH BURRILL, &c., *Defendants.*

X. Order
for Revivor.

Upon motion this day made unto this Court by Mr. W. of Counsel for the plaintiffs, it was alleged &c. [the original bill, proceedings, deaths of defendants, and probates of their wills by the above-named defendants.] That the said suit and proceedings having become abated by the deaths of the said defendants as aforesaid, the plaintiffs thereupon exhibited their bill of revivor in this Court against the said defendants, to which they have appeared; but their time for answering being expired (*a*), it was therefore prayed that the said suit and proceedings might stand revived, and be in the same plight and condition as the same were in at the time of the said abatement, which is ordered accordingly (*b*).

(*a*) It is submitted that this expression, although in constant use, is erroneous; for a plaintiff may obtain the order for revivor before the time for *pleading* or *demurring* is out, and, much more, before the time for *answering* is out. The

more correct expression, under the Tenth Order of 1833, would be, "their time for *shewing cause* being expired." But even this would not be strictly true. *Vide* page 119.

(*b*) *Lupton v. Burrill*, Reg. Lib. 1832, B. fol. 1307.

XI. *Original Bill in the Nature of a Bill of Revivor.—Vide Chap. VIII.*

IN CHANCERY.

To the Right Honorable &c.

Humbly complaining sheweth unto your Lordship your orator Francis Tyler of &c. that in or about the month of March 1834, Edward Graves, one of the defendants hereinafter named, being seised or entitled in fee simple of or to the freehold messuage and hereditaments hereinafter described, entered into an agreement with George Hargrave, late of &c., Esq. deceased, for the sale thereof to him; and that such agreement was reduced into writing by certain Articles of Agreement, bearing date the 10th day of March 1834, and made between the said Edward Graves of the one part, and the said George Hargrave of the other part, and signed by the said Edward Graves and George Hargrave, whereby the said Edward Graves, in consideration of the sum of £1000, to be paid as therein and hereinafter mentioned, agreed that he or his heirs would on or before the 1st day of May then next, to the satisfaction of the said George Hargrave or his heirs, and of his or their Counsel, make out a good title to the said messuage and hereditaments hereinafter described, and by good and sufficient conveyances in the law convey and assure unto the said George Hargrave and his heirs, or as he or they should appoint, free from all incumbrances, a good and sufficient estate of inheritance of and in all that messuage &c. In consideration whereof the said George Hargrave did thereby covenant and agree with the said Edward Graves, that he the said George Hargrave

XI. Original Bill in the Nature of a Bill of Revivor. Agreement for sale of an estate.

XI. Original
Bill in the
Nature of a
Bill of Revivor.

Abstract de-
livered and
title approved
of.

Vendor re-
fuses to com-
plete the agree-
ment.

Bill by the
purchaser for
specific per-
formance.

would pay or cause to be paid to the said Edward Graves the sum of £1000 &c. as in and by one part of the said agreement (now in the custody of your orator) when produced will more fully appear.

And your orator further sheweth, that in pursuance of the said agreement, an abstract of the title to the said messuage and hereditaments was, shortly after the date of the said articles of agreement, sent unto the attorney concerned for the said George Hargrave for his perusal; and several objections having been from time to time made to the said title, all such objections were cleared up to the satisfaction of the said George Hargrave, who thereupon caused the draft of a deed, purporting to be a conveyance of the said messuage and hereditaments from the said Edward Graves to the said George Hargrave and his heirs, to be submitted to the said Edward Graves for his approval and execution: but your orator sheweth that the said Edward Graves would neither approve of, nor object to, the said draft, but utterly refused, without any cause, to abide by the said agreement.

And your orator further sheweth that in consequence of such refusal on the part of the said Edward Graves as aforesaid, and on or about the 6th day of January 1835, the said George Hargrave filed his original bill of complaint in this Honorable Court against the said Edward Graves, thereby stating the several matters and things hereinbefore stated, and praying that the said Edward Graves might be decreed specifically to perform the said agreement so entered into by him as aforesaid, and to execute the deed of conveyance the draft of which had been so tendered to him as aforesaid, or some other conveyance of or to the same purport or effect, and to deliver up to the said George Hargrave all the title deeds and documents in the

custody or power of the said Edward Graves which in anywise related to or concerned the said messuage and hereditaments, the said George Hargrave being thereupon ready and willing, and thereby offering, to pay to the said Edward Graves the said sum of £1000, and in all respects to perform the said agreement on his part; and that the said George Hargrave might have such further or other relief in the premises as the nature of his case might require, and to your Lordship should seem meet.

XI. Original
Bill in the
Nature of a
Bill of Revivor.

And your orator further sheweth that the said Edward Graves appeared and put in his answer to the said bill, and that the said George Hargrave replied thereto; and that the cause being at issue, witnesses were examined and publication passed; as by the said bill, answer, and proceedings, now remaining as of record in this Honorable Court, reference being thereto had, will more fully appear.

Appearance
and answer of
the vendor.

And your orator further sheweth that before any further proceedings were had in the said suit, and on the 1st day of February 1836, the said George Hargrave departed this life, leaving John Hargrave the other defendant hereinafter named, his only son and heir him surviving, and having previously made and published his last will and testament in writing, bearing date the 18th day of December 1835, and executed and attested so as to pass freehold estates, and having thereby given and devised the said messuage and hereditaments, so contracted to be purchased by him as aforesaid, to your orator, his heirs, and assigns, and having appointed your orator sole executor thereof; as in and by the said will when produced will more fully appear.

Death of the
plaintiff, the
purchaser.

His heir.

Devise to this
plaintiff.

Makes this
plaintiff his
executor.

And your orator further sheweth that the said will was on &c. duly proved by your orator in the Prero-

This plaintiff
proves the
will.

XI. Original
Bill in the
Nature of a
Bill of Revivor.

Charge that
this plaintiff is
entitled to the
benefit of the
agreement.

Charge that
suit is abated,
and this plain-
tiff entitled to
revive it.

That heir at
law is a neces-
sary party.

gative Court of Canterbury, whereby your orator became the legal personal representative of the said George Hargrave, as by the probate copy of such will, when produced, will more fully appear.

And your orator charges that by virtue of the devise so made to your orator as aforesaid, he is entitled to stand in the place of the said George Hargrave with respect to the said agreement of the 10th day of March 1834, and to have the same specifically performed, and to have the said messuage and hereditaments conveyed by the said Edward Graves to your orator and his heirs, upon payment of the said sum of £1000, which sum your orator hereby offers to pay.

And your orator charges that by the death of the said George Hargrave the said suit and proceedings became abated, but that your orator is, as he is advised, entitled to have the same revived against the said Edward Graves, and to have the same relief against the said Edward Graves as the said George Hargrave would be entitled to if he were still living.

And your orator charges that the said John Hargrave, as heir at law of the said George Hargrave, sometimes, though without any ground, questions the validity of the said devise to your orator, and is therefore, as your orator is advised, a necessary party to this suit.

To the end therefore that the said defendants may, if they can, shew why your orator should not have the relief hereby prayed ; and may upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by

the note hereunder written they are respectively required to answer; that is to say,—

1. Whether &c.

And that it may be declared that your orator, as such devisee of the said George Hargrave as aforesaid, is entitled to revive the said suit and proceedings so become abated as aforesaid, and to have the benefit thereof; and that the said suit and proceedings may be decreed to stand and be revived accordingly, and to be in the same plight and condition as they were in at the time of the said abatement; and that your orator may have the same relief against the said defendant Edward Graves as the said George Hargrave would be entitled to, if he were still living; and, if necessary for that purpose, that the said will of the said George Hargrave may be established; and that your orator may have such further &c. [Further relief. Subpœna against Edward Graves and John Hargrave.]

XI. Original
Bill in the
Nature of a
Bill of Revivor.
Prayer.

The defendant Edward Graves is required to answer &c.

The defendant John Hargrave is required to answer &c.

XII. *Supplemental Bill in the Nature of a Bill of Revivor.—Vide Chap. VIII.*

IN CHANCERY.

To the Right Honorable &c.

XII. Supplemental Bill in the Nature of a Bill of Revivor.

Original bill by purchaser for specific performance.

Humbly complaining sheweth unto your Lordship your orator Philip Duberly of &c. that on or about &c. your orator exhibited his original bill of complaint in this Honorable Court against Mark Hepburn Esq. as defendant thereto, *thereby stating* (among other things) certain Articles of Agreement bearing date &c. and signed by the said Mark Hepburn and your orator, whereby the said Mark Hepburn agreed to sell to your orator the fee simple and inheritance of a certain messuage situate at &c. with the hereditaments appertaining thereto, called Oak Mount, for the sum of £2000; *and further stating* that the title to the said messuage and hereditaments was submitted to, and approved of by, your orator; *and further stating* that the said Mark Hepburn afterwards refused to carry the said agreement into execution; *and praying* that the said Mark Hepburn might be decreed specifically to perform the said agreement so entered into by him as aforesaid, and to convey the said messuage and hereditaments to your orator, or as he should direct; your orator being ready and willing, and thereby offering, to pay to the said Mark Hepburn the said sum of £2000, and in all respects to perform the said agreement on your orator's part; and that your orator might have such further or other relief in the premises as the circumstances of the case might require, and to your Lordship should seem meet.

And your orator further sheweth that the said Mark

Appearance,
answer, &c.

Hepburn, being duly served with process, appeared to the said bill, and put in his answer thereto; which answer was replied to; and the cause being at issue, witnesses were examined, and publication passed; as by the said bill, answer, and proceedings, now remaining as of record in this Honorable Court, reference being had thereto, will more fully appear.

XII. Supplemental Bill in the Nature of a Bill of Revivor.

And your orator further sheweth, by way of supplement, that before any further proceedings were had in the said cause, the said Mark Hepburn departed this life on or about &c. leaving Orlando Hepburn, one of the defendants hereinafter named, his eldest son and heir at law, him surviving; and having previously made and published his last will and testament in writing, dated &c. and executed and attested as by law was then required for passing real estate, whereby he devised and bequeathed all his real and personal estate whatsoever and wheresoever unto James Howson and Richard Hewitt, the other defendants hereinafter named, their heirs, executors, administrators, and assigns, respectively, upon certain trusts therein mentioned; and he thereby declared that the receipts of the said James Howson and Richard Hewitt should be good and valid discharges for all monies which might come to them by virtue of that his will; and he appointed the said James Howson and Richard Hewitt executors of his said will; as by such will, or the probate copy thereof, when produced will fully appear.

Death of the vendor after devising his property to trustees, whom he appoints executors.

And your orator further sheweth by way of supplement, that the said James Howson and Richard Hewitt have duly proved the said will in the Prerogative Court of Canterbury, and have thereby become the legal personal representatives of the said testator; and that by such devise as aforesaid the legal estate in the hereditaments so contracted to be sold to your

Probate of the will, &c.

XII. Supplemental Bill in the Nature of a Bill of Revivor.

Charges the abatement and right to revive.

Calls for answer.

Prayer.

orator as aforesaid, has become vested in them, although the said Orlando Hepburn, as such heir at law as aforesaid, sometimes falsely pretends the contrary, and insists that the said devise is void.

And your orator charges that, by the death of the said Mark Hepburn, the said suit and proceedings have become abated; and that your orator is entitled to have the same revived and put in the same plight and condition, as well against the said Orlando Hepburn, as against the said James Howson and Richard Hewitt, as they were in at the time of the said abatement, and to have the same benefit against the said James Howson, Richard Hewitt, and Orlando Hepburn, as he might have had against the said Mark Hepburn, if he were living.

To the end therefore that the said defendants may, if they can, shew why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer: that is to say;—

1. Whether &c.

And that it may be declared that your orator is entitled to revive the said suit and proceedings which have so become abated as aforesaid; and that the same may be decreed to be revived accordingly, and to stand in the same plight and condition as they stood in previously to the said abatement, and that your orator may have the same relief against the said defendants James Howson and Richard Hewitt, as devisees and personal representatives of the said Mark Hepburn, and also against the said Orlando Hepburn

as heir at law of the said Mark Hepburn, in case he shall appear to have any interest in the matters in question, as your orator might have had against the said Mark Hepburn if he were still living; and that &c. [Further relief. Subpœna against James Howson, Richard Hewitt, and Orlando Hepburn.]

XII. Supplemental Bill in the Nature of a Bill of Revivor.

The defendants James Howson and Richard Hewitt are required to answer &c.

The defendant Orlando Hepburn is required to answer &c.

XIII. Decree for Revivor.—*Vide Chap. VIII.*

IN CHANCERY.

MINSHULL and others, *Plaintiffs.*

LORD MOHUN and others, *Defendants.*

This cause coming this present day to be heard and debated before the Right Honorable the Lord Keeper of the Great Seal of Great Britain, in the presence of the Counsel learned for all the parties except the defendant the Lord Mohun, none appearing for him albeit he was duly served with subpœna to hear judgment, as by affidavit now read appears, the substance of the plaintiffs' bill appeared to be &c. [mentions the original pleadings, the abatement, and a supplemental bill in the nature of a bill of revivor.] Whereupon, and upon debate of the matter, and hearing the answer of the defendant the Lord Mohun read, and what could be alleged by the Counsel for all the other parties, His Lordship declared that the defendant the Lord Mohun ought to be bound by the former decree and proceedings, as devisee of the said estate, as much as if he had taken the same by descent; and doth

XIII. Decree for Revivor.

XIII. Decree
for Revivor.

therefore think fit, and so order and decree, that the said former decree and proceedings do stand revived and be carried on and executed against the Lord Mohun; and that the said partition and allotment &c. [here follows the decree upon the merits.] And this decree is to be binding to the Lord Mohun, unless the said defendant the Lord Mohun, being served with process of subpœna for that purpose, shall at the return thereof shew unto this Court good cause to the contrary. But, before he is to be admitted to shew cause, he is to pay unto the plaintiffs costs for this day's default to be taxed by the said Master (a).

XIV. *Original Information in the Nature of a Supplemental Information against the Successor of a Rector Defendant.—Vide Chap. X.*

IN CHANCERY.

To the Right Honorable &c.

XIV. Original
Information in
the Nature of a
Supplemental
Information.

Will of Wm.
Stacey.

Residuary per-
sonal estate to
executors on
trust.

One third to
niece's chil-
dren.

Informing sheweth unto your Lordship Sir A. B. Knt. Her Majesty's Attorney General, at and by the relation of William Buller of &c. Esq. that William Stacey late of &c. Esq. duly made and executed his last will and testament bearing date the 12th day of May 1838, and thereby, after bequeathing several legacies, gave and bequeathed all the residue of his personal estate whatsoever unto his executors thereafter named, upon trust, as to one equal third part thereof, for all the children of his niece Caroline Stacey, who should be living at his the said testator's death, equally to be divided between them, share and

share alike ; and as to one other equal third part thereof, upon trust that his said executors should convert the same into money and invest the clear proceeds thereof in the purchase of Consolidated three per cent. annuities in their names, and should pay the dividends arising therefrom unto the rector for the time being of the parish of Ames in the county of M. for the absolute use and benefit of such rector in augmentation of his stipend ; and as to the remaining third part of his said residuary personal estate, upon trust that his said executors should convert the same into money, and invest the clear proceeds thereof in the purchase of Reduced three per cent. annuities in their names, and apply the dividends arising therefrom in the relief of poor and decayed tradesmen in the said parish of Ames ; and the said testator appointed Thomas Holwell and Marmaduke Stacey, two of the defendants hereto, his executors, and gave them the first year's income of his estate for their own use, as by the probate thereof will appear.

XIV. Original Information in the Nature of a Supplemental Information.

One third to rector of parish.

Remaining third to the poor.

And Her Majesty's Attorney General, at and by the relation aforesaid, further sheweth, that the said William Stacey departed this life on or about the 1st day of December 1838, without having revoked or in anywise altered his said will ; and such will was in the month of January 1839 duly proved in the Pre-rogative Court of Canterbury by the said Thomas Holwell and Marmaduke Stacey, by means whereof they became, and now are the legal personal representatives of the said testator.

Death and Probate.

And Her Majesty's Attorney General, at and by the relation aforesaid, further sheweth, that at the time of the death of the said testator the said Caroline Stacey had two children living, and no more, that is to say, Henry Stacey, and Charlotte Stacey ; and that

Names of the children of the niece and rector of the parish.

XIV. Original
Information in
the Nature of a
Supplemental
Information.

Original in-
formation.

at the same period the Rev. James Scott was the rector of the said parish of Ames.

And Her Majesty's Attorney General, at and by the relation aforesaid, further sheweth, that on the 7th day of July 1839 the said Attorney General, at the relation of the said William Buller, filed his original information in this Honorable Court against the said Thomas Holwell, Marmaduke Stacey, Henry Stacey, Charlotte Stacey, and James Scott, as defendants thereto, stating to the effect hereinbefore stated, and praying that the trusts of the said will of the said William Stacey might be carried into effect under the direction of this Court, and that the usual accounts of the personal estate of the said testator, and of his debts, funeral and testamentary expenses, and legacies, might be taken, and the clear residue of his personal estate ascertained and distributed; and that in particular one equal third part of such clear residue might be laid out in the purchase of Reduced three per cent. annuities, and secured in this Court for the charitable purposes in the said will in that behalf mentioned; and that it might be referred to one of the Masters of this Court to approve of a scheme for the said Charity; and that such further or other relief might be had in the premises as the nature of the case might require and to your Lordship should seem meet.

Appearance
and answers.

And Her Majesty's Attorney General, at and by the relation aforesaid further sheweth, that the said several defendants to the said original information, being duly served with process, appeared and put in their several answers thereto; and that the said cause was heard upon information and answer before His Lordship the Master of the Rolls on the &c. when His Lordship was pleased to refer it to the Master to inquire and state to the Court whether the said Caroline

Reference to
Master.

Stacey had any and what child or children living at the death of the said testator or born in due time afterwards ; and if the said Master should find that the said Caroline Stacey had any child or children living at the death of the said testator or born in due time afterwards, and that such child, or all such children, was or were a party or parties to the said suit, then he was to proceed to take an account of the personal estate of the said testator not specifically bequeathed, come to the hands of the said Thomas Holwell and Marmaduke Stacey, or either of them, or any person or persons by their or either of their order, or for their or either of their use ; and it was ordered that the said Master should take an account of the debts, funeral expenses, and legacies of the said testator, and compute interest on such of his debts as carried interest after the rate the same respectively carried interest, and upon his legacies after the rate of four per cent. per annum from the end of one year after the said testator's death ; and it was ordered that the said Master should cause an advertisement to be published in the London Gazette, &c. [as to the creditors of the testator.] And it was ordered that the said testator's personal estate should be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of his legacies. And the said Master was to ascertain and certify the amount of the clear residue of the said testator's personal estate, distinguishing such part, if any, as consisted of chattels real ; and for better taking of the said account and discovery of the matters aforesaid, the parties were to produce before the said Master upon oath, all deeds, papers, and writings in their custody or power relating thereto, and were to be examined upon interrogatories as the said Master should direct ; and His Lord-

XIV. Original Information in the Nature of a Supplemental Information.

XIV. Original
Information in
the Nature of a
Supplemental
Information.

ship reserved the consideration of all further directions, and of the costs of the said suit, until after the said Master should have made his report; and any of the parties were to be at liberty to apply to this Court as they should be advised.

Master has not
yet made his
report.

And Her Majesty's Attorney General, at and by the relation aforesaid, further sheweth, that in pursuance of the said decree divers proceedings have been had before the Master to whom the said cause was referred, but he has as yet made no report thereon, as by the said original information and other proceedings, now remaining as of record in this Honorable Court, reference being had thereto, will more fully appear.

Death of
the Rector
and appoint-
ment of a
successor.

And Her Majesty's Attorney General, at and by the relation aforesaid, further sheweth, that pending the said proceedings before the Master, and within one year after the death of the said testator, that is to say, on or about &c. the said James Scott departed this life, and shortly afterwards, that is to say, on or about &c. the Rev. Ebenezer Wilkinson, one of the defendants hereinafter named, was duly presented to the said Rectory, and instituted and inducted into the same, and he is now the true and lawful rector thereof.

Charge of
right to benefit
of former pro-
ceedings.

And Her Majesty's Attorney General, at and by the relation aforesaid, charges that by such the death of the said James Scott as aforesaid the said original suit became defective and incapable of being continued, but that he the said Attorney General is entitled to supply such defect by this his present information, and thereby to have the same relief as he would have had from his said original information, if the said Ebenezer Wilkinson had at the time of the filing thereof been the rector of Ames aforesaid, and had been made a party to such original information, and

that for that purpose this his information ought to be taken as supplemental to such former information.

XIV. Original Information in the Nature of a Supplemental Information.

And Her Majesty's Attorney General, at and by the relation aforesaid, further charges, that the said Thomas Holwell and Marmaduke Stacey dispute the title of the said Ebenezer Wilkinson and are therefore necessary parties to this suit.

Executors are necessary parties.

To the end therefore that the said defendants may, if they can, shew why the said Attorney General should not have the relief hereby prayed, and may upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say;—

Calls for answer.

1. Whether, &c.

And that Her Majesty's Attorney General may have the same relief from his said original information, as he might have had if at the time of the filing thereof the said Ebenezer Wilkinson had been rector of the said parish of Ames, and had been made a party defendant to such information; and that for that purpose this information may be taken as supplemental to such former information; and that such further or other relief may be had in the premises as the circumstances of the case may require, and to your Lordship shall seem meet, may it please, &c. [subpœna against Ebenezer Wilkinson, Thomas Holwell, and Marmaduke Stacey.]

Prayer.

The defendant Ebenezer Wilkinson is required, &c.

The defendants Thomas Holwell and Marmaduke Stacey are required, &c.

XV. *Decree on an Original Bill in the Nature of a Supplemental Bill; filed by a Remainder-man on the Death of a Tenant for Life.—Vide Chap. X.*

XV. Decree on
an Original
Bill in the
Nature of a
Supplemental
Bill.

This cause coming on this present day to be heard and debated before the Right Honorable the Master of the Rolls, in the presence of Counsel learned on both sides; and the pleadings being opened, upon debate of the matter, and hearing what was alleged by the Counsel on both sides; His Lordship doth declare that the plaintiff, as claiming to be interested in remainder to property of which Catharine Mary Upjohn deceased, in the pleadings of this cause named, was tenant for life, is entitled to have the benefit of the cause in the said pleadings mentioned, wherein the said Catharine Mary Upjohn, by Thomas Henry Waller her next friend, was plaintiff, and the plaintiff and the defendants in this cause were the defendants; and of all the proceedings in such former cause; and that, as far as may be necessary to obtain such benefit, the plaintiff is entitled to stand in the place of the said Catharine Mary Upjohn, for the purpose of prosecuting and continuing the said former suit and proceedings: And His Lordship doth decree the same accordingly: And it is ordered that the Order made in this cause(a) on the twenty-second day of February, 1841, be continued, and the accounts and inquiries thereby directed be carried on: And His Lordship doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report pursuant to the said Order:

(a) This was an order made on inquiries, which had been directed motion for continuing preliminary in the original cause.

And any of the parties are to be at liberty to apply to this Court as there shall be occasion (b).

XV. Decree on an Original Bill in the Nature of a Supplemental Bill.

XVI. *Original Bill in the Nature of a Supplemental Bill by the Assignees of a Sole Plaintiff who became Bankrupt pendente lite.—Vide Chap. XI.*

IN CHANCERY :

To the Right Honorable &c.

Humbly complaining shew unto your Lordship your orators Joseph Hunt of &c. and William Brown of &c. that in the month of &c. John Farrant, the defendant hereinafter named, being seised or otherwise entitled in fee simple of or to a certain messuage and hereditaments called &c. situate, &c. borrowed the sum of £3000 of William Dunsford of Cornhill in the City of London, merchant, upon the security of the said premises, and thereupon by indentures of lease and release bearing date respectively &c. the indenture of release being made between the said John Farrant of the one part, and the said William Dunsford of the other part, in consideration of the sum of £3000 to the said John Farrant paid by the said William Dunsford, the said messuage and hereditaments were conveyed and assured by the said John Farrant unto and to the use of the said William Dunsford, his heirs and assigns, subject to a proviso for redemption of the same on payment by the said John Farrant, his heirs, executors, administrators, or assigns, to the said William Dunsford, his executors, administrators, or assigns, of the sum of £3000, with interest for the same after the

XVI. Original Bill in the Nature of a Supplemental Bill.

Mortgage in fee.

(b) *Upjohn v. Upjohn*, Reg. Lib. B. 1840, fol. 1072; and *supra*, Chap. X.

XVI. Original Bill in the Nature of a Supplemental Bill. rate of five per cent. per annum, at the time in the said indenture of release mentioned, and long since past; as in and by the same indentures of lease and release when produced will more fully appear.

Mortgage becomes absolute. And your orators further shew that the said sum of £3000 was not paid at the time in the said indenture of release in that behalf provided, whereby the estate and interest of the said William Dunsford in the said messuage and hereditaments became absolute at law, and redeemable only in equity.

Mortgagee enters into possession. And your orators further shew that shortly afterwards the said William Dunsford entered into possession, or into the receipt of the rents and profits, of the said messuage and hereditaments, and continued in such possession or receipt up to the time of his bankruptcy hereinafter stated.

Amount of the debt due at the filing of the original bill. And your orators further shew that on the 6th day of June 1840 there was due to the said William Dunsford, on the security of the said mortgage, for principal and interest, after deducting all sums received by him on account of the said rents and profits, or otherwise, the sum of £3879 18s. 5d.

Original bill of foreclosure. And your orators further shew that on the said 6th day of June 1840 the said William Dunsford exhibited his original bill of complaint in this Honorable Court against the said John Farrant as defendant thereto, thereby stating the matters and things hereinbefore stated, and praying that an account might be taken, by and under the direction and decree of this Honorable Court, of what was due to him for principal and interest on his said mortgage, and that the said John Farrant might be decreed to pay to him the said William Dunsford, or as he should direct, the amount of what should be so found due to him, together with the costs of that suit, by a short day to be appointed for that purpose by this Honorable Court, the said William

Dunsford being ready and willing, and thereby offering, upon such payment being made, to reconvey the said messuage and hereditaments to the said John Farrant, or as he should direct ; or that, in default of such payment being made, the said John Farrant, and all persons claiming under him, might be barred and foreclosed of and from all right title and equity of redemption of in and to the said mortgaged premises, and might deliver up to the said William Dunsford all deeds evidences and writings in their custody or power relating thereto, and might do and execute all necessary acts and deeds for the purpose of more effectually vesting and securing the same to the said William Dunsford, and that he the said William Dunsford might have such further or other relief in the premises as the nature of his case might require, and to your Lordship should seem meet.

XVI. Original Bill in the Nature of a Supplemental Bill.

And your orators further shew that the said John Farrant, being duly served with process, appeared to the said bill of the said William Dunsford and put in his answer thereto, to which the said William Dunsford replied, and that the said cause being at issue, witnesses were examined on both sides, and publication passed ; as by such bill, answer, and proceedings, now remaining as of record in this Honorable Court, reference being thereto had, will more fully appear.

Proceedings in the cause.

And your orators further shew that before any further proceedings were had in the said cause, and on or about &c. a fiat in bankruptcy was awarded and issued against the said William Dunsford, under which he was duly found and declared a bankrupt, and your orator Joseph Hunt was duly chosen by the creditors of the said William Dunsford to be the assignee of his estate and effects ; and your orator William Brown was duly appointed the Official Assignee in the said bank-

Bankruptcy of the plaintiff.

XVI. Original Bill in the Nature of a Supplemental Bill.

Plaintiffs have entered into possession.

Charge that plaintiffs are entitled to the mortgage debt.

Charge that plaintiffs are entitled to the benefit of the former suit.

Calls for answer.

Prayer.

ruptcy; as by the said fiat and other proceedings, now of record in the Court of Bankruptcy, reference being had thereto, will more fully appear.

And your orators further shew that your orators, as such assignees, have entered into possession or into the receipt of the rents and profits of the said mortgaged premises.

And your orators charge that by virtue of their said appointment your orators have become entitled to the said sum of £3879 18s. 5d. so due and owing for principal and interest as aforesaid, or to such other sum as shall be found to be now due and owing for principal and interest on the said mortgage.

And your orators charge that by the said bankruptcy of the said William Dunsford, the said suit so instituted by him has become defective, but that your orators, as such his assignees as aforesaid, are entitled to have the benefit of such suit and of the proceedings therein, and to prosecute the same against the said John Farrant from the period when it so became defective as aforesaid, and that for that purpose this their bill ought to be taken as supplemental to the said bill of the said William Dunsford.

To the end therefore that the said defendant may, if he can, shew why your orators should not have the relief hereby prayed, and may upon his corporal oath, according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written he is required to answer; that is to say;—

1. Whether &c.

And that it may be declared that your orators as such assignees as aforesaid, are entitled to have the

benefit of the said original suit, and of the proceedings therein; and that your orators may be at liberty to prosecute the same against the said defendant from the period when the said original suit so became defective by the bankruptcy of the said William Dunsford as aforesaid; and that for that purpose this bill may be taken as supplemental to the said bill of the said William Dunsford; and that your orators may have the same relief against the said defendant as the said William Dunsford might have had if he had not become bankrupt; and that your orators may have &c. [Further relief. Subpœna against John Farrant.]

XVI. Original Bill in the Nature of a Supplemental Bill.

The defendant is required to answer all the above interrogatories.

XVII. *Supplemental Bill against the Assignees of a Defendant who became Bankrupt pendente lite.—Vide Chap. XI.*

IN CHANCERY.

To the Right Honorable, &c.

Humbly complaining sheweth unto your Lordship your orator John Bailey of &c. that on &c. your orator exhibited his original bill of complaint in this Honorable Court, which was afterwards amended by order &c. and which bill so amended was against David Smith and Thomas Egan as defendants thereto; *thereby stating* that by indentures of lease and release, bearing date respectively the 20th and 21st days of September 1834, and made between your orator of the one part, and the said David Smith of the other part, in consideration of a sum of £5000 to your orator advanced and lent by the said David Smith, your orator conveyed

XVII. Supplemental Bill against Assignees of Bankrupt Defendant.

Original bill for redemption of a mortgage.

XVII. Supple-
mental Bill
against Assig-
nees of Bank-
rupt De-
fendant.

and assured unto the said David Smith and his heirs a certain farm and hereditaments called Rosemount, situate at &c. of which your orator was seised in fee; to hold the same unto the said David Smith his heirs and assigns for ever, subject to redemption on payment by your orator, his heirs, executors, administrators, or assigns, unto the said David Smith, his executors, administrators, or assigns, of the sum of £5000, together with interest for the same after the rate of four and a half per cent. per annum on the 21st day of March 1835: *And further stating* that the said sum of £5000 was not paid to the said David Smith on the day so appointed for such payment as aforesaid: *And further stating* that by indentures of lease and release, bearing date respectively the 4th and 5th days of May 1837, and made between the said David Smith of the one part and the said Thomas Egan of the other part, for the considerations therein mentioned the said David Smith assigned the sum of £2500 being one equal moiety of the said sum of £5000, so due from your orator as aforesaid, together with one equal moiety of all interest thenceforth to accrue upon the said sum of £5000, unto the said Thomas Egan his executors, administrators, and assigns, for his and their own use and benefit. And the said David Smith thereby conveyed and assured the said farm called Rosemount, and all and singular the hereditaments in the said indentures of the 20th and 21st days of September 1834 comprised, unto the said Thomas Egan and his heirs, to the use of the said Thomas Egan and David Smith their heirs and assigns as tenants in common, subject nevertheless to such right or equity of redemption as the same were subject to by virtue of the said indenture of the 21st day of September 1834: *And further stating* that the whole of the said sum of £5000 was still due and

owing from your orator, together with interest thereon after the rate aforesaid from the 21st day of September 1840, and that he was desirous of redeeming the said mortgage, and had applied for that purpose to the said David Smith and Thomas Egan, and offered to pay them the said principal sum and interest according to their several rights therein, and had requested them to reconvey the said hereditaments to your orator, and to deliver to him all deeds, papers and writings relating thereto; and that the said David Smith was willing so to do, but that the said Thomas Egan refused to accede to your orator's said requests: *And praying* that it might be referred to one of the Masters of this Honorable Court to take an account of what was due from your orator to the said defendants for principal and interest on the said mortgage, and to whom the same was payable; and that upon payment by your orator of the amount which should be so found due, in the manner in which the said Master should find the same to be payable (which your orator thereby offered to do) the said defendants might be decreed to reconvey the said mortgaged premises to your orator, or as he should direct, and to deliver up all deeds, papers and writings in their or either of their custody or power relating thereto; and that your orator might have such further or other relief in the premises, as the circumstances of his case might require, and to your Lordship should seem meet.

XVII. Supplemental Bill against Assignees of Bankrupt Defendant.

Prayer.

And your orator further sheweth that the said David Smith and Thomas Egan, being duly served with process, appeared to your orator's said bill, and the said David Smith put in his answer thereto; as by such original bill and proceedings now remaining as of record in this Honorable Court, reference being had thereto, will fully appear.

Appearance of both defendants.

Answer of Smith.

XVII. Supplemental Bill against Assignees of Bankrupt Defendant.

Bankruptcy of Egan.

And your orator further sheweth by way of supplement, that before the said Thomas Egan had answered your orator's said bill, or any further proceedings were had in the said cause, and on or about &c. a fiat in bankruptcy was awarded and issued against the said Thomas Egan, under which he was duly found and declared a bankrupt; and Henry Jones, one of the defendants hereinafter named, was duly chosen by the major part of the creditors to be the assignee of the estate and effects of the said bankrupt; and Walter Wiseman, the other defendant hereinafter named, was duly appointed the Official Assignee under the said bankruptcy; as by the said fiat and other proceedings, now remaining as of record in the Court of Bankruptcy, reference being thereto had, will more fully appear.

Assignees are necessary parties.

And your orator charges that by means of such fiat and proceedings all the estate right and interest of the said Thomas Egan in the said mortgage debt, and the security for the same, has become vested in the said Henry Jones and Walter Wiseman; and the said suit so instituted by your orator as aforesaid has become defective; but your orator is entitled to have the benefit of such suit, and of all the proceedings therein, against the said Henry Jones and Walter Wiseman, as such assignees as aforesaid, and to have the same relief against them as he might have had against the said Thomas Egan, if he had not become bankrupt.

Calls for answer to both bills.

To the end therefore that the said defendants may, if they can, shew why your orator should not have the relief hereby, and by his said original bill (*a*), prayed, and may upon their several and respective corporal

(*a*) These words ought to be inserted when the supplemental bill calls for an answer to the original bill.

oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories in your orator's said original bill numbered and set forth, as by the note thereunder written the said Thomas Egan was required to answer, and also to such of the said several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say;—

XVII. Supplemental Bill against Assignees of Bankrupt Defendant.

1. Whether &c.

And that your orator may have the benefit of his said original suit, and of all the proceedings therein, against the said defendants as such assignees as aforesaid, and may have the same relief against them as he might have had against the said Thomas Egan if he had not become such bankrupt as aforesaid; and that your orator may have &c. [Further relief. Subpœna for appearance and answer to both bills against Henry Jones and Walter Wiseman.]

Prayer.

The defendants are required to answer all the above interrogatories.

XVIII. *Decree on a Supplemental Bill against the Assignees of a Defendant to the Original Bill, who had become Insolvent after Decree.—Vide Chap. XI.*

— His Honor doth declare the plaintiff entitled to the benefit of the former suit, and of the decree made therein, bearing date &c. and of the proceedings under the same, against the present defendant, as representative of the defendant John Cumberland Altham;

XVIII. Decree on a Supplemental Bill against Assignees.

XVIII. Decree and His Honor doth order and decree the same accordingly; and it is ordered that the said decree and proceedings be carried on against the said defendant, as they were directed to be carried on against the said defendant John Cumberland Altham; and His Honor doth reserve the consideration of all further directions, and of the costs of this suit, as the same were reserved by the former decree; and any of the parties are to be at liberty to apply to this Court as they may be advised (a).

on a Supplemental Bill against Assignees.

XIX. *Order that a Purchaser pendente lite, not a Party to the Suit, be at liberty to attend the Master in making Inquiries under the Decree.—Vide Chap. XI.*

In this case William Farlar, a stranger to the suit, had purchased, after decree, but pending a reference to the Master, the interest of William Francis Toosey, one of the plaintiffs, who had since become insolvent.

XIX. Order that Purchaser may attend the Master.

— His Honor doth order that the said petitioner William Farlar be at liberty to attend the said Master upon the several inquiries directed by the said order of the 6th day of June 1821; and it is ordered that the solicitor for the plaintiffs do, from time to time, give notice to the petitioner of all proceedings to be had and taken in the said Master's Office, and otherwise, in and about the suit, until the further order of

(a) *Phillips v. Clark*, Reg. Lib. B. 1833 fol. 1391.

this Court ; the petitioner by his Counsel undertaking to pay the costs of all parties, and of the assignees of the plaintiff William Francis Toosey, of this application, to be taxed &c. and that the same be paid by the said petitioner; and this order is to be without prejudice to the rights of the parties to this suit, and also without prejudice to the right of the assignees of the plaintiff William Francis Toosey to dispute the validity of the assignment in the said petition named (a).

XIX. Order that Purchaser may attend the Master.

XX. *Supplemental Bill against an Infant born pendente lite.*—*Vide Chap. XII.*

IN CHANCERY.

To the Right Honorable &c.

Humbly complaining sheweth unto your Lordship your orator Thomas Winslow of &c. that on or about &c. your orator exhibited his original bill of complaint in this Honorable Court against Stephen Joy and Lucy his wife and Mary Sumner, as defendants there- to, *thereby stating* the will of the Rev. Arthur Sumner deceased, bearing date &c. whereby, after bequeathing divers pecuniary and specific legacies as therein mentioned, he gave and bequeathed the residue of his personal estate to your orator, upon trust to convert the same into money, and to invest the proceeds thereof as therein mentioned, and to pay the annual income arising therefrom to the said Stephen Joy during his life, and after his decease to the said Lucy Joy during her life, and after the decease of the survivor of them the said Stephen Joy and Lucy his wife,

XX. Supplemental Bill against a Child born *pendente lite*.

Original bill by executor for an account.

(a) *Toosey v. Burchell*, Reg. Lib. B. 1820, fol. 1427.

XX. Supple-
mental Bill
against a Child
born *pendente*
lite.

upon trust to pay and transfer the capital of the said investments unto all the children of the said Stephen Joy by the said Lucy his wife, who being sons should attain the age of twenty-one years, or being daughters should attain that age or be married, equally to be divided between them share and share alike, and in case there should be only one such child, in trust for such only child; and in case there should be no child of the said Stephen Joy by the said Lucy his wife, who being a son should live to attain the age of twenty-one years, or being a daughter should attain that age or be married, then upon trust to pay and transfer the said trust funds to the said Mary Sumner, her executors, administrators, or assigns; and the said testator appointed your orator sole executor of his said will: *And further stating* the death of the said testator, and the probate of his will by your orator, and that the said Stephen Joy had then no issue by the said Lucy his wife: *And praying* that the trusts of the said will of the said testator might be executed under the sanction of this Honorable Court, and that proper accounts might be taken under a decree of this Court of the personal estate of the said testator, and of his debts and funeral and testamentary expenses, and of the legacies given by his will; and that such personal estate might be applied in a due course of administration, and the clear residue thereof ascertained, and invested and secured for the benefit of all parties entitled thereto, your orator submitting to account for all assets received by him, or by his order or for his use, and to act in the premises as the Court should direct; and that your orator might have such further or other relief in the premises as the circumstances of his case might require, and to your Lordship should seem meet.

And your orator further sheweth, that the said Stephen Joy and Lucy his wife, and Mary Summer, being duly served with process, appeared to your orator's said bill, and put in their answers thereto, and the said cause came on to be heard on bill and answer before His Lordship the Master of the Rolls on &c. when His Lordship was pleased to order and decree that it should be referred to the Master of this Court in rotation, to inquire and state whether there was, or had ever been, any and what issue of the said Stephen Joy by the said Lucy his wife; and in case he should find that there was not, and never had been, any such issue, then, your orator submitting by his said bill to account, it was ordered that the said Master should proceed to take an account of the personal estate of the said testator come to the hands of your orator, or of any other person or persons by his order or for his use; and it was ordered that the said Master should proceed to take an account of the debts, funeral expenses, and legacies of the said testator &c. [the usual decree for an account.] And this Court reserved the consideration of all further directions until after the said Master should have made his report; and any of the parties were to be at liberty to apply to this Court as they should be advised.

XX. Supplemental Bill against a Child born *pendente lite*.

Appearance, Answer, and Decree for account.

And your orator further sheweth that divers proceedings have, in pursuance of the said decree, been had before the Master to whom the said cause was referred, but he has as yet made no report thereon; as by such bill and proceedings, now remaining as of record in this Honorable Court, reference being thereto had, will more fully appear.

Master has not yet made his report.

And your orator further sheweth, by way of supplement, that pending the aforesaid proceedings before the Master, and on &c. a child was born of the said

Birth of a child interested under the will.

XX. Supple-
mental Bill
against a Child
born *pendente*
lite.



Lucy Joy, by her husband the said Stephen Joy ; and that such child was a daughter, and has since been christened by the name Lucetta, and is the defendant hereinafter named.

And your orator charges that such child is interested in the residuary personal estate of the said Arthur Sumner, and is a necessary party to this suit, and that your orator is entitled to have the same relief from his said original bill as if the said Lucetta Joy had been born before the same was filed, and had been made a party thereto.

Calls for an-
swer to both
bills.

To the end therefore that the said defendant may, if she can, shew why your orator should not have the relief hereby, and by his said original bill (*a*), prayed, and may upon her corporal oath, according to the best and utmost of her knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories in your orator's said original bill numbered and set forth, and also to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written she is required to answer ; that is to say ;—

1. Whether &c.

And that your orator may have the same relief from his said original bill as if the said defendant had been born before the same was filed, and had been made a party thereto ; and that your orator may have &c. [Further relief. Subpœna for appearance and answer to both bills against Lucetta Joy.]

The defendant is required to answer the interrogatories in the original bill numbered respectively &c. and all the above interrogatories.

(*a*) These words should be inserted when the supplemental bill calls for an answer to the original bill.

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